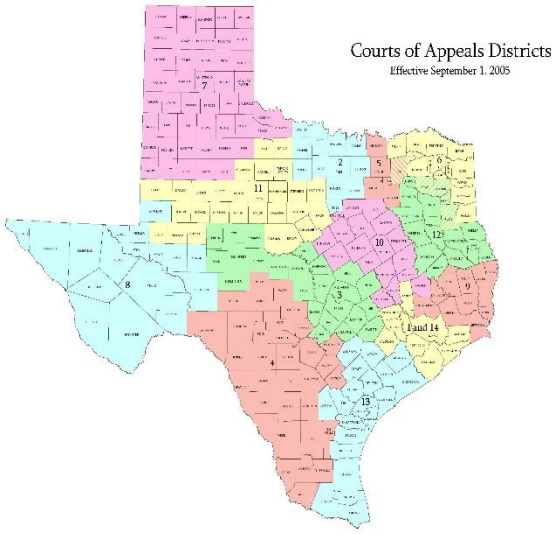

RECENT STATE CASES OF INTEREST TO CITIES

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Laura, originally from Yukon, Oklahoma, graduated summa cum laude from the University of Oklahoma in 2001 with a liberal arts degree. She attended the University of Texas School of Law and worked as a law clerk for TML and as an intern for the Travis County Juvenile Public Defender's Office while there. After graduating with honors in 2004, Laura clerked for the Supreme Court of Texas. She joined the TML legal staff as legal counsel in November 2006. Laura became Assistant General Counsel in November 2010. She became an associate of the Bojorquez Law Firm in April 2016, and became City Attorney for the City of Dripping Springs in January 2020. Laura specializes in employment law, sign regulation, and open government. Besides serving Texas cities, Laura also enjoys spending lots of time in quarantine with her husband Chris, her two sons, Johnathon and Joshua, and her daughter, Emma.

TML LEGAL DEPARTMENT
Austin, Texas

The Texas Municipal League (TML) Legal Services Department provides legal assistance to TML member cities. The attorneys answer general questions, participate in educational seminars, prepare handbooks, magazine articles, and written materials, including legal opinions and amicus briefs, and provide support services for the Legislative Department. The Staff also assists with trainings and the TCAA newsletter which contains articles and the case summaries presented in this paper.

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We would like to give a shout out to Ryan Henry, whose timely summaries on all cases of interest to cities makes everyone's job just a little bit easier. If you have not had a chance to sign up to be placed on his free email list for case summaries, you should check it out at.

CIVIL FORFEITURE

Civil Forfeiture: *1812 Franklin St. v. State of Texas*, No. 06-19-00065-CV, 2020 WL 1482584 (Tex. App.—Texarkana Mar. 27, 2020). Richard Lynn Clark (Clark), with his wife, Ester, owned the house at 1812 Franklin Street in Bonham, Texas, which they bought in February 2015. In August 2015, Clark was stopped by an officer of the Bonham Police Department (BPD) on his motorcycle and was found in possession of 5.14 grams of methamphetamine. Clark told the officer that he was on his way home and admitted that he intended to keep the drug at his home. Clark plead guilty to the second-degree felony of possessing more than four, but less than 200, grams of methamphetamine and pursuant to a plea agreement was sentenced to eight years imprisonment and ordered to pay a $1,500 fine.

While Clark was incarcerated, Ester sold drugs from the house and allowed various other illegal activities to take place there. Over many months of surveillance of the house, stopping people that left the house, and finding them in possession of drugs, and seeing the presence of "wanted people," the Bonham Police Department raided the house in July 2018 after a controlled buy was made at the house. Through communications with his sister, Clark was aware of the activities going on at his house while he was incarcerated.

The State of Texas filed a civil forfeiture case to declare Clark's house contraband under Article 59 of the Texas Code of Criminal Procedure. The trial court found the house was contraband because it was used in the commission of several drug-related offenses and ordered its forfeiture. Clark filed an appeal and argued that the State failed to meet its burden of proof to show that the house was contraband, that he proved the innocent-owner defense because he was in prison while Ester was using the property to commit the drug-related offenses without his knowledge, and that the forfeiture violated the Excessive Fines Clause of the Eight Amendment of the United States Constitution.

The Sixth Court of Appeals did not agree. The court took up each argument separately. First, the Court found that the State did have legally and factually sufficient evidence to support the finding that the house was contraband since the state did meet its burden of proof by a preponderance of the evidence. The state showed that for a period of several months, drugs and paraphernalia were found in the house, on the persons of people in the house, and during traffic stops of vehicles leaving the house which showed a substantial connection between the property and the illegal activity. Also, the court noted that community property is not exempt from forfeiture where the property is being used by a spouse in a manner that violates the Texas Controlled Substance Act, even though the property is used by one spouse without the knowledge or consent of the other spouse. Therefore, the state did not have to show that the owner had knowledge of the illegal activity in order to prove that the property is contraband.

Second, the court found that there was legally and factually sufficient evidence that supported the trial court's rejection of Clark's innocent-owner affirmative defense. For a person to prevail under this defense, once the state has met its burden, the burden shifts to parties claiming this defense to prove that the owner or interest holder was not a party to the offense giving rise to the forfeiture, and that the contraband was used or intended to be used without the effective consent

of the owner or interest holder in the commission of the offense giving rise to the forfeiture. Though Clark established the first requirement (not a party to the offenses that gave rise to the forfeiture), he could not prove that he did not give effective consent. Clark admitted that he used methamphetamine at his house for a few years before he was incarcerated. Also, while incarcerated, Clark received information from his sister about Ester's illegal activities going on in the house and he continued to support Ester and authorized the paying of bills by his sister. Clark impliedly consented to the drug-related activity happening in his house.

Third, the Court found the forfeiture did not violate the Excessive Fines Clause. For there to be a violation of the Excessive Fines Clause, the following factors have to be considered: (1) the nature of the offense; (2) the relationship or the offense to other illegal activities; (3) whether the defendant was in the class of persons addressed by the forfeiture statute; (4) the maximum fines and sentences for the offense committed and the level of culpability reflected by the penalties; and (5) the harm that the defendant caused. *United States v. Bajakajian*, 524 U.S. 321, 337-39 (1998). After reviewing all the factors from the *Bajakajian* proportionality test, the court did not find that the house's forfeiture was grossly disproportionate to the offenses giving rise to the forfeiture. The forfeiture did not result from Clark's arrest, it resulted from the raid of the house which revealed that Ester was running a drug haven in the house, as well as other illegal activities being observed and people being arrested for the drug activity happening in the house. Ester was definitely the class of person that the forfeiture statute was addressing, i.e. drug traffickers. Ester's state jail felony carried a maximum fine of $10,000 and maximum of two years imprisonment. Additionally, four other people were arrested during the raid for possession of methamphetamine, which they presumably purchased at the house with Ester's approval. The maximum fines for the offenses of each of the additional people arrested would exceed the purchase price of the house ($45,000). Finally, there are many studies that clearly demonstrate the direct nexus between illegal drugs and crimes of violence and that our society is negatively affected by criminal drug activities. This illegal activity is exactly what the civil forfeiture statute was designed to permit the state to prevent.

Last, the court found that Clark failed to preserve his remaining points of error since Clark did not properly raise complaints concerning double jeopardy and collateral estoppel barring the trial court's consideration of his 2015 conviction, forfeiture of his house being barred by double jeopardy, trial court error in taking judicial notice of unobjected-to testimony from another case, and officers offered allegedly perjured testimony. Therefore, the court affirmed the trial court's judgment.

Civil Forfeiture: *State of Texas v. Ten Thousand Two Hundred Fourteen Dollars*, No. 07-18-00306-CV, 2020 WL 1597849 (Tex. App.—Amarillo Apr. 1, 2020) (mem. op.). In May 2017, Andre Dyer Faina (Faina) was pulled over by Sherman County deputy sheriffs for failing to signal a right turn within 100 feet of an intersection. During the stop, a City of Stratford canine officer arrived and allowed his dog to perform a free air sniff of Faina's car. The dog indicated a positive alert for the presence of illegal odor of narcotics emitting from Faina's car. Deputies searched Faina's car and found approximately $10,214 under the driver's seat. When asked where he was going, Faina stated he was going to visit his mother in Oklahoma. When told he

was headed in the wrong direction, Faina said he made an exit in Dallas that brought him to Stratford, as well as, that his sister was graduating. When asked about the money, Faina stated that he was taking it to his mother to repay a debt and intended to give a portion to his sister. Faina stated he had previously been in trouble in Houston for a "little amount" of marijuana.

Faina was arrested for an outstanding New Mexico warrant for possession of marijuana that happened in August of 2016 for transporting six pounds of marijuana from Colorado. Faina's arrest record showed an arrest in Houston for two pounds of marijuana, but there was no evidence that Faina was ever convicted of these alleged crimes. While in custody, Faina voluntarily spoke with the deputies and consented to a search of his cellphone. Deputies found a highlighted route from Wichita Falls to the Denver, Colorado area. When deputies asked about the map and no address in Oklahoma, Faina said his sister graduated the previous weekend.

The State of Texas filed a civil forfeiture lawsuit of the seized money discovered in Faina's car, alleging the money was contraband as defined by Article 59.01(2) of the Texas Code of Criminal Procedure. Faina answered and filed a no-evidence motion for summary judgement, asserting that the state had no evidence the seized money was contraband under the statute. The state responded with a deputy's affidavit. The trial court granted Faina's motion and rendered a judgement directing the state to restore the seized money to Faina. The State of Texas appealed.

The state argued that the trial court erred on rendering summary judgment for Faina because it presented more than a scintilla of evidence that the money was contraband. Specifically, the state argued the summary judgement evidence, including all inferences to be drawn therefrom, raised a genuine issue of material facts that Faina was going to use the money to drive to Colorado and buy large amounts of marijuana.

The Seventh Court of Appeals did not agree. The state had the burden of proving that Faina intended to drive to Colorado to buy a large amount of marijuana with the money found in his car. Based on the summary judgment evidence in the light most favorable to the non-moving party, the court held that the state failed to present more than a scintilla of evidence that the seized money constituted contraband. All the evidence and inferences supported a finding that Faina was driving to Colorado when he was stopped in a routine traffic stop, he had prior arrest for drug-related offenses, and the money had been around illegal narcotics. But that the money was going to be used to purchase a large amount of marijuana would require the court to impermissibly stack inference upon inference. The state did not meet its no-evidence summary judgement burden of presenting more than a scintilla of evidence to establish a substantial connection between the money it seized and its alleged use to buy marijuana, and therefore that the seized money was contraband. The court overruled the state's issue and affirmed the judgement of the trial court.

Civil Forfeiture: *Approximately $23,606.00 United States Currency v. State of Texas,* No. 07-19-00297-CV, 2020 WL 1500073 (Tex. App.—Amarillo Mar. 27, 2020) (mem. op.). On June 6, 2016, the State of Texas filed a notice of seizure and intended forfeiture of approximately $23,606.00 seized from Guinapauline Santos (Santos) under Article 59 of the Texas Code of Criminal Procedure. Various procedural matters delayed the trial court granting the state's

motion of summary judgment and denial of Santos's motion to dismiss on August 12, 2019. Some of these delays included Santos not filing a response to the state's discovery requests, an informal tacit abatement agreement to wait for the Supreme Court of Texas to opine on a case similar to the present case, and Santos filing her notice of intent to challenge the constitutionality of the forfeiture statute. Santos appealed the trial court's judgment contending the trial court erred by denying her motion to dismiss for want of prosecution and that the statutory forfeiture scheme violates constitutional protections.

The Seventh Court of Appeals disagreed with Santos. Rule 6.1 of the Texas Rules of Civil Procedure provides time standards in which trials should be brought to trial or final disposition. Generally, civil nonjury cases should be tried or brought to final disposition within twelve months from the appearance date. However, the application of Rule 6 is discretionary and nonbinding and may not be possible to adhere to if the case is especially complex or has special circumstances. In this case, the court stated that many of the delays in this case were caused by Santos. Thus, the trial court did not abuse its discretion in denying Santos' motion of dismissal.

Also, the Court stated that a constitutional challenge of a state statute is a serious matter and requires adequate briefing, including the citing of legal authority and substantive analysis to support the issues for the complaint to not be waived. The court held Santos presented none of this, but that her writing appeared to suggest little more than a personal viewpoint on the supposed inequities of historic and current forfeitures. Therefore, Santos waived her constitutional attack of the civil forfeiture statute. The trial court's judgment is affirmed.

CIVIL PROCEDURE

Civil Procedure: *Town of Shady Shores v. Swanson*, No. 18-0413, 2019 WL 6794327 (Tex. Dec. 13, 2019). This is an employment case, but the focus on the opinion is a procedural one. Importantly, the Supreme Court of Texas held: (1) a no-evidence motion for summary judgment was proper to raise a jurisdictional challenge, and (2) the Texas Open Meetings Act (TOMA) did not waive immunity for declaratory relief, only mandamus and injunctive relief.

Swanson was the former Town Secretary for Shady Shores. She brought claims asserting she was wrongfully discharged. The town filed a plea to the jurisdiction, which was granted as to the *Sabine Pilot* and Whistleblower claims. The town later filed traditional and no-evidence summary judgment motions (on immunity grounds) as to the TOMA declaratory judgment claims, which the trial court denied. The town took an interlocutory appeal, but Swanson kept filing motions. The trial court granted Swanson leave to file a motion for a permissive interlocutory appeal as Swanson asserted, she filed her notice of appeal (for the plea to the jurisdiction) within 14 days of the town's notice of appeal for the summary judgments. When Swanson attempted to hold further proceedings and obtain an order on the permissive appeal, the town filed a separate mandamus action (which was consolidated for purposes of appeal). The court of appeals declined to issue the mandamus noting the trial court did not actually sign any orders, noting Swanson did not timely file an appeal, and was not granted a permissive appeal.

The court of appeals held allowing a jurisdictional challenge on immunity grounds via a no-evidence motion would improperly shift a plaintiff's initial burden by requiring a plaintiff to

"marshal evidence showing jurisdiction" before the governmental entity has produced evidence negating it. It also held the entity must negate the existence of jurisdictional facts. After recognizing a split in the appellate courts, the Supreme Court of Texas rejected the reasoning noting in both traditional and no-evidence motions, the court views the evidence in the light most favorable to the nonmovant. Because the plaintiff must establish jurisdiction, the court could "see no reason to allow jurisdictional challenges via traditional motions for summary judgment but to foreclose such challenges via no-evidence motions." Thus, when a challenge to jurisdiction that implicates the merits is properly made and supported—whether by a plea to the jurisdiction or by a traditional or no-evidence motion for summary judgment—the plaintiff will be required to present sufficient evidence on the merits of her claims to create a genuine issue of material fact. Such a challenge is proper using a no-evidence summary judgment motion.

Next, the Court held the Uniform Declaratory Judgment Act (UDJA) does not contain a general waiver of immunity, providing only a limited waiver for challenges to the validity of an ordinance or statute. UDJA claims requesting other types of declaratory relief are barred absent a legislative waiver of immunity with respect to the underlying action. Under TOMA, immunity is waived only "to the express relief provided" therein—injunctive and mandamus relief—and the scope does not extend to the declaratory relief sought. Thus, TOMA's clear and unambiguous waiver of immunity does not extend to suits for declaratory relief against the entity. However, Swanson did seek mandamus and injunctive relief as well, which were not addressed by the court of appeals, even though argued by the town. As a result, the Supreme Court remanded these claims to the court of appeals to address.

Municipal Court: *Chapa v. State*, No. 05-19-00609-CR, 2020 WL 1129980 (Tex. App.—Dallas March 9, 2020) (mem. op.). This is an appeal of a municipal court conviction in which the court of appeals affirmed the trial court's order.

Chapa was cited by City of Carrolton Police for operating a motor vehicle with an expired registration. Chapa pled not guilty, and, following a jury trial in the city's municipal court of record, was found guilty and assessed a fine. Chapa timely appealed to the county court of criminal appeals arguing that the municipal court's judgement should be reversed because he was prevented from registering his vehicle by the Texas "scofflaw" statute, Section 502.010 of the Texas Transportation Code, which allows a county assessor to deny vehicle registration to individuals with outstanding fines or warrants. The county court of criminal appeals found that Chapa failed to preserve error for appeal by not filing a reporter's record and affirmed the municipal court's judgement. Chapa appealed.

In the county court, Chapa presented ten issues broadly contending that his conviction for operating a motor vehicle with an unexpired registration was improper because he was prevented from renewing his registration. However, in his motion for a new trial to the court of appeals he only raised four issues and failed to raise the issues regarding his inability to register his vehicle due to state law. Because he failed to raise these issues, the court found that he forfeited these issues. For the issues he did raise, the court found that Chapa failed to provide an argument or legal authority to support his position and failed to provide a court reporter's record that would

allow the court to assess his claims. Accordingly, the court affirmed the judgement of the county court of criminal appeals.

Civil Procedure: ***City of Arlington v. Warner,*** **No. 02-18-00427-CV, 2019 WL 2554237 (Tex. App.—Fort Worth June 20, 2019) (mem. op.).** In this inverse-condemnation case on interlocutory appeal, the Second Court of Appeals affirmed the lower court's decision to deny the City of Arlington's no-evidence summary-judgment motion challenging subject matter jurisdiction.

Warner is the owner of a three-acre piece of property in the city. The city has a drainage easement across her property. Warner alleges that when it rains, water running through the easement causes her pond and property to flood, resulting in damage. Warner filed suit against the city seeking injunctive and monetary relief based on a theory of inverse-condemnation.

At the lower court, the city filed a no-evidence summary judgment motion asserting that Warner had failed to adequately plead her claim and that she presented no evidence of those claims. The city filed the interlocutory appeal after the lower court denied its summary-judgment motion.

The court held that a governmental entity cannot use a no-evidence summary-judgment motion on governmental immunity grounds to avoid the burden of asserting the evidence needed for a plea to jurisdiction. Thus, the trial court's denial of the motion was proper, and the court affirmed the ruling.

Civil Procedure: ***Fratus v. City of Beaumont,*** **No. 09-18-00294-CV, 2019 WL 5076241 (Tex. App.—Beaumont Oct. 10, 2019) (mem. op.)**. This is an interlocutory appeal in a firefighter termination case where the Beaumont Court of Appeals affirmed the granting of the City of Beaumont's plea to the jurisdiction.

Fratus filed a petition seeking damages, declaratory relief and injunctive relief against the city based on discriminatory employment practices and his termination as a firefighter. The city filed a plea to the jurisdiction claiming governmental immunity and seeking dismissal of the claims. Fratus appealed arguing the trial court erred in granting the city's plea to the jurisdiction on: (1) his claim for declaratory and equitable relief from the city's retaliation against Fratus because of his exercise of protected speech under Article I, Section 8 of the Texas Constitution; (2) his claim for discriminatory employment action by the city because he is Hispanic or in retaliation for him having opposed the fire chief's sexual harassment of another employee; and (3) his claim that that the 2015-2019 Collective Bargaining Agreement (CBA) is void because the city failed to post the negotiations in compliance with the Texas Open Meetings Act (TOMA).

Because Fratus's claim for declaratory relief is based on harms that have already occurred, he has not pleaded a claim that overcomes the city's immunity. Fratus's claim for equitable relief for constitutional violations is not a claim against a city official at all and does not defeat the city's plea to the jurisdiction. Fratus failed to plead a prima facie free speech claim because he failed to show that the speech, he engaged in was primarily as a citizen involving a matter of public concern. His first issue is overruled.

Fratus failed to plead an adverse employment action that would support a Texas Commission on Human Rights Act (TCHRA) claim. While Fratus was terminated, he appealed that termination under the CBA and does not dispute that he was reinstated. And his other complaints do not rise to the level of material adversity necessary to show an adverse employment action under the TCHRA. His second issue is overruled.

Fratus' TOMA claim "does not meet briefing requirements because it lacks citations to the record or to applicable authority and therefore presents nothing for" the court to review. Without a pleading to support the claim, the city's immunity is not waived. His third issue is overruled.

Civil Procedure: *Meuth v. City of Seguin*, No. 04-18-00205, 2019 WL 3208830 (Tex. App.—San Antonio July 17, 2019) (mem. op.). The case arises from an appeal from the trial court's order granting the City of Seguin's second plea to the jurisdiction.

Meuth owns a residence located in a subdivision that backs up to the Guadalupe River. A steel drainage pipe runs underneath her residence and funnels storm water from a concrete inlet at the street underneath the property and into the river. In 2014, Meuth sued the city seeking monetary damages, declaratory relief, and injunctive relief because the flow of storm water from the subdivision through the drainage pipe culvert under her home caused soil erosion and instability on her property. In response to her suit, the city filed a plea claiming immunity from suit. The trial court granted the city's plea and dismissed Meuth's claims for an unconstitutional taking, declaratory judgement, intentional and negligent misrepresentations, fraud in a real estate transaction, and gross negligence. Meuth's remaining claim for injunctive relief was severed into a separate cause of action. The court of appeals affirmed the trial court's grant of the city's plea to the jurisdiction finding that Meuth failed to plead a valid takings claim; her declaratory judgement claim was an impermissible attempt to obtain monetary damages because she sought to hold the city liable for costs associated with removing the drainage culvert and restoring the property; and that the city's refusal to repair and replace the drainage culvert was a governmental function for which immunity is not waived (Meuth I). However, her claim for injunctive relief was not subject to the court's decision in Meuth I. After Meuth I became final, the city filed a second plea to the jurisdiction in the severed action asserting that Meuth I controls the disposal of Meuth's cause of action under the doctrine of "law of the case," which provides that questions of law decided on appeal to a court of last resort will govern the case throughout its subsequent stages. Meuth amended her petition to include new factual allegations, a claim of nuisance, and broadened the injunctive relief requested. The trial court granted the city's plea. Meuth filed a motion to reconsider and a new trial, which was denied by the trial court. Meuth appealed.

The court of appeals considered whether the doctrine of the "law of the case" applies to the city's second plea to the jurisdiction. Because the "law of the case" only applies to questions of law, and not fact, when a party amends its pleadings in the second trial, the issues or facts may sufficiently change so that the law of the case no longer applies. The court determined that the legal analysis of the takings claim in Meuth I was based on the factual allegations in Meuth's petition, as it existed at the time – allegations of inaction by the city. However, because Meuth amended her petition, before the trial court's ruling on the city's second plea, to add new factual allegations of affirmative, intentional acts by the city in support of her broadened request for

injunctive relief and claim of nuisance, the "law of the case" doctrine did not apply. Additionally, the court concluded that the city waived any objections to Meuth's amended petition as the city did not raise an objection to the amendment in trial court. Accordingly, the court reversed the trial court's judgement and remanded the case.

Civil Procedure: *Wilson v. City of Austin*, No. 03-18-00806-CV, 2019 WL 6336187 (Tex. App.—Austin Nov. 27, 2019) (mem. op). This appeal stems from the county court's order granting the City of Austin's motion to strike, special exception, and motion to dismiss in a case related to an automobile accident.

In July 2015, Wilson sued Phillips alleging that Phillip's negligence caused an automobile collision in August 2013 that resulted in Wilson's injuries. Phillips excepted to the petition and moved to dismiss the suit, arguing that Wilson should have sued the city because Phillips was driving within the scope of his employment with the city when the alleged accident occurred. The court granted the motion and dismissed the suit against Phillips with prejudice. In December 2015, Wilson filed a petition for bill of review claiming that her due process rights were violated because she was not served with Phillips answer or notice of hearing on his motion to dismiss, and never received notice of the order dismissing the suit. The county court reinstated the case, and Wilson filed her first amended original petition in June 2016 and listed the city as a defendant and alleged two counts of negligence, one against Phillips and the other against the city. A week later, Wilson filed a second amended petition and a notice of nonsuit with prejudice as to all her claims against Phillips. In October 2016, the court signed an order granting the notice of nonsuit and dismissing the claims against Phillips with prejudice.

Two years later, Wilson filed her third amended petition (although titled a first amended petition) that named Phillips as the sole defendant and did not mention or discuss the city. Phillips excepted to the petition naming Phillips as the sole defendant as he had been nonsuited with prejudice. Phillips also moved to dismiss the case because Wilson should not be given leave to amend the petition to name the city as the defendant given that the claims would now be time barred, and alternatively, for the cause to be dismissed for want of prosecution. A few days later, Wilson filed her fourth amended petition listing the city as the defendant and specifically stating the she did not intend at the time of filing the third amended petition to dismiss the city as a party, and that it was a clerical mistake. The city filed a motion to strike, a motion to dismiss, and a special exception, and noted that Wilson did not request leave to file her fourth amended petition against the city. Wilson responded, arguing that the relation back doctrine applies under the misnomer or misidentification theories to make her claims against the city timely. The court dismissed, with prejudice, Wilson's claims against Phillips. The court also sustained the city's exception, disallowing Wilson from repleading as the claims against the city were time barred, thereby dismissing Wilson's claims against the city with prejudice. Wilson appealed the order related to the city arguing that the county court abused its discretion in granting the city's special exception and dismissing her claims.

The court of appeals affirmed the county court's decision. The court determined that by Wilson filing her third amended petition in which she omitted the city as a defendant, she effectively nonsuited or voluntarily dismissed her claims against the city. Additionally, the court found that

Wilson's claims against the city raised in her fourth amended petition that added the city as a defendant were untimely because the statute of limitations had run at the time of the third amended petition. The court also found that the misnomer and misidentification theories in the context of the relation back doctrine are inapplicable because Wilson did not misname the city as a defendant; rather she omitted the city as a defendant and omitted all discussion and reference to the city.

Declaratory Judgment: ***City of Houston v. Hope for Families, Inc.*****, No. 01-18-00795-CV, 2020 WL 97176 (Tex. App.—Houston [1st Dist.] Jan. 9, 2020) (mem. op.)**. This is a declaratory judgment case where Hope for Families (HFF) sought to declare a deed from HFF to the city void.

The city selected HFF to receive funding to purchase, demolish, and rehabilitate a foreclosed, dilapidated apartment complex as part of its community development program. HFF learned that the property was encumbered with delinquent property taxes. Before it could reach a resolution of the tax delinquency, Wade, a city employee, negotiated an agreement with one of HFF's board members to convey title to the city. HFF sued to have the conveyance of title declared void. The trial court denied the city's and Wade's plea to the jurisdiction.

First, the court of appeals determined that the Uniform Declaratory Judgment Act does not have a general waiver of governmental immunity. These types of lawsuits against a governmental entity are suits against the state for which the plaintiff needs a waiver of governmental immunity to proceed. There is no such waiver.

HFF also sued under the theory that the Texas Business Organizations Code provides a remedy to declare the conveyance invalid. However, the court of appeals determined that there is no authority for HFF to bring the lawsuit; only the attorney general has standing to undo the deed between HFF and the city. HFF could sue only its board member under the Texas Business Organizations Code.

Even when attempting to treat HFF's claim as a trespass to title, the city still retained its immunity because there is no waiver of governmental immunity for that claim. However, Wade as an individual could be sued for acting *ultra vires*. In order to fall under the *ultra vires* exception, "a suit must not complain of a government officer's exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial duty." The court concluded that HFF's petition had alleged sufficient facts that Wade acted improperly in filing the deed. Thus, those claims against him in his official capacity could proceed.

The court reversed the trial court when it came to the city and granted the plea to the jurisdiction. The court dismissed the claims against the city for lack of subject-matter jurisdiction. The court reversed the portion of the trial court's order denying Wade's plea to the jurisdiction regarding the title dispute claim and remanded the issue for further proceedings. It affirmed the remainder of the order.

Quo Warranto: ***State v. City of Double Horn*****, No. 03-19-00304-CV, 2019 WL 5582237 (Tex. App.—Austin Oct. 30, 2019)**. This is an appeal of the trial court's order denying the State of Texas' petition for leave to file a quo warranto challenging the incorporation of the City of Double Horn as a Type B general law municipality.

The State of Texas filed its "Petition for Leave to File an Information in the Nature of Quo Warranto" (petition) seeking to declare the incorporation of the city invalid and void for failure to comply with statutory requirements for incorporation and to remove the city's officers from office. The State alleged that the incorporation failed to meet two statutory requirements: (1) that the community intending to incorporate constitutes an unincorporated town or village prior to incorporation; and (2) that the proposed boundaries include only the territory to be used strictly for municipal purposes. The trial court considered the ultimate merits of the case, denied the State's petition, and ultimately dismissed the suit. The State appealed, arguing that the trial court erred by applying the wrong pleading standard and failing to accept its allegations as true in determining whether it had probable ground to bring a quo warranto action.

The court of appeals reviewed the trial court's decision for abuse of discretion and determined that the petition stated a probable ground for a quo warranto action. The court concluded that, in making a probable-ground determination, the trial court need only determine if the petition stated a cause of action to proceed. Additionally, the court, after reviewing the State's factual allegations, found that the State sufficiently stated a claim for relief on its claim of invalid incorporation, and, thus, probable ground for a quo warranto proceeding. Accordingly, the court determined that the trial court erred in dismissing the State's petition and remanded the case for further proceedings.

Insurance Claims: ***City of Spearman v. Texas Mun. League Intergovernmental Risk Pool*****, No. 07-18-00402-CV, 2020 WL 1174183 (Tex. App.—Amarillo Mar. 11, 2020).** The City of Spearman submitted a claim with the Texas Municipal League Intergovernmental Risk Pool (TMLIRP), a governmental self-insurance fund, for hail damage to buildings caused by a hailstorm that occurred on May 16, 2016. TMLIRP sent an adjuster to inspect five buildings for hail damage and estimated the replacement-cost value of the covered loss to be $5,437.66. TMLIRP sent the city a sworn statement in proof of loss for the city to sign that reflected the adjuster's estimate of the loss. The city neither returned the proof of loss nor filed any other sworn proof of loss. The city hired a roofing contractor to inspect some of the buildings and submitted an estimate of the required repairs to TMLIRP. TMLIRP sent an engineering firm to conduct a second inspection and the firm determined that there was no additional covered loss beyond that identified by the initial inspection. TMLIRP informed the city of the results of the latest inspection.

In May 2017, the city filed suit against TMLIRP for breach of contract, claiming TMLIRP had improperly denied coverage and underpaid the claim. TMLIRP answered the suit and filed a traditional and no-evidence motion for summary judgment. In its motions, TMLIRP claimed five reasons why there was no breach of contract including that the city failed to submit a sworn proof of loss. The trial court granted TMLIRP's motion for summary judgment without

specifying the grounds for its ruling and dismissed the city's breach of contract claim with prejudice. The city appealed.

The city challenged all five grounds presented in the TMLIRP's motion for summary judgment. However, the Sixth Court of Appeals only addressed the sworn proof-of-loss issue as it was dispositive. The court affirmed the trial courts granting of TMLIRP's motion for summary judgment because a proof of loss is a "condition precedent to recovery on the policy" according to the Supreme Court of Texas. *Am. Teachers Life Ins. Co. v. Brugette*, 728 S.W.2d 763, 764 (Tex. 1987). The city failed to submit the proof of loss as required by the policy, as well as, failed to satisfy a condition to recovery in the policy. Therefore, under the circumstance presented to the court, the trial court had one ground supporting its decision.

COURT FEES

Court Fees: *Dulin v. State*, Nos. 03-18-00523-CR; 03-18-00524-CR, 2019 WL 3807866 (Tex. App.—Austin Aug. 14, 2019). This is an appeal challenging the constitutionality of the time payment fee assessed against a defendant convicted of two offenses in a single criminal action.

Dulin was convicted under two separate cause numbers and sentenced to imprisonment for one count of indecency with a child, nine counts of aggravated sexual assault of a child, one count of continuous sexual abuse of a child under the age of 14, and one count of "super" aggravated sexual assault of a child. The trial court also assessed court costs of $589 and $639 for the count of indecency and for the "super" aggravated sexual assault of a child, respectively. Dulin appealed asserting that the time payment fee assessed against him must be reduced because a portion of the fee is unconstitutional and that duplicative costs must be deleted.

The court first looked at the constitutionality of Section 133.103(b) and (d) of the Local Government Code, which provides that a person convicted of an offense shall pay a fee of $25 if any part of a fine, court cost, fee, or restitution is paid on or after the 31st day after the date judgement is entered with $12.50 remitted to the State Comptroller and $10 retained in the general revenue of a city or county. The court concluded that because these fees are general revenue not sufficiently related to a legitimate criminal justice purpose, subsections (b) and (d) are facially unconstitutional and violate the separation of powers doctrine under article II, section I of the Texas Constitution. The court also concluded that the trial court should not have assessed the same court costs against Dulin in both cause numbers as he was convicted of two offenses in a single criminal action.

Court Fees: *Simmons v. State*, No. 10-18-00269-CR, 2019 WL 6464999 (Tex. App.—Waco Nov. 27, 2019). This is an appeal challenging, among other things, the constitutionality of the time payment fee assessed against Simmons, who was convicted of assault family violence with a prior conviction for assault family violence.

Section 133.103 of the Local Government Code provides that a $25 fee be charged to a person convicted of a felony or misdemeanor if the person pays "any part of a fine, court costs, or restitution on or after the 31st day after the date on which the judgment is entered assessing the fine, court costs, or restitution." The statute directs that the fee be allocated in the following

manner: (1) fifty percent to the comptroller to the credit of the general revenue fund; (2) ten percent to the general fund of the city or county for the purpose of improving the efficiency of the administration of justice in the city or county; and (3) forty percent to the general revenue account of the county or city. Simmons contested the percentage of the $25-time payment fee directed to the comptroller and the general revenue account of the county or city, described in (1) and (3), above.

Like other Texas courts (including the First, Third, Eleventh, and Fourteenth Courts of Appeal), the Waco Court of Appeals concluded that, because these fees are general revenue not sufficiently related to a legitimate criminal justice purpose, Section 133.103(b) and (d) are facially unconstitutional. The trial court's judgment was modified to change the time-payment fee from $25 to $2.50.

(Note: Senate Bill 346, effective January 1, 2020, amends the court cost structure, including the time payment fee. It remains to be seen whether the amendments cure the constitutional defects identified in this and previous cases.)

Court Fees: *Ovalle v. State*, No. 05-19-00136-CR, 2020 WL 364140 (Tex. App. – Dallas Jan. 22, 2020). This is a constitutional challenge to certain allocations of court fees imposed under Section 133.103 of the Local Government Code.

Ovalle challenged the allocation of the $25 fee imposed under Section 133.103 whereby 50 percent of the fee is sent to the comptroller for deposit in the general revenue fund and 40 percent is deposited in the general revenue account of the county or municipality. The State asserted that Ovalle had waived the issue by failing to object in trial court. The court of appeals found that the allocations were unconstitutional as violating the separation-of-powers provision of the Texas Constitution. Additionally, the court found that Ovalle did not have the opportunity to challenge the fee in trial court as the court costs was not imposed in court or itemized in the initial judgement, rather, the itemized bill of costs did not show the fee until one month after the judgement was signed.

ELECTIONS (Election Language; Charter)

Election Language: *Bryant v. Parker*, No. 01-18-00400-CV, 2019 WL 2588107 (Tex. App.—Houston [1st Dist.] June 25, 2019). In this case, the First Court of Appeals held that the City of Houston's ballot proposition regarding term limits was not misleading.

Bryant and Scarborough were election contestants who challenged a ballot measure about term limits for the city's elective offices. In the months leading up to the November 2015 elections, the city sought to amend the provision in its charter governing term limits to establish four-year terms of office and two-term limits. Specifically, the language submitted to the voters was:

"(Relating to Term Limits for City Elective Offices) Shall the City Charter of the City of Houston be amended to reduce the number of terms of elective offices to no more than two terms in the same office and limit the length for all terms of elective office to four years, beginning in January 2016; and provide for transition?"

The city's voters approved the measure. Bryant filed an election contest on the grounds that the ballot language was misleading. Scarborough intervened and said the ballot language was insufficient to submit the issue to the voters. The parties all filed motions for summary judgment. The trial court granted the city's motion and denied Bryant's and Scarborough's motions.

The First Court found that cities have broad—but not unlimited—discretion in the wording of ballot propositions. The court looked at the language of the ballot measure and found that the ballot language communicated the number of terms an individual could serve in the same office and the length for all terms. It also informed the voters that the amendment would provide for transition. The court concluded that the ballot language was not misleading, and the city was entitled to judgment as a matter of law. The court overruled Bryant and Scarborough's remaining arguments. It confirmed the trial court's grant of the city's summary judgment.

Election Language: ***Johnson v. Williams*****, No. 02-19-00089-CV, 2019 WL 6334689 (Tex. App.—Fort Worth Nov. 27, 2019) (mem. op.)**. The Fort Worth Court of Appeals affirmed a plea to the jurisdiction in a case where a resident sued to invalidate a charter amendment.

Arlington residents initiated a petition drive for an amendment to the city charter that would impose term limits on the mayor and the city council (Proposition E), which the voters passed. Arlington resident Johnson asserted that because the petition summary misled petition signers, the petition's circulators had committed fraud, and the resulting amendment should be struck down. He filed suit to invalidate the provision. The city defendants filed a plea to the jurisdiction and motion for summary judgment, which the trial court granted. Johnson appealed.

Elections are political matters, and the courts have jurisdiction of political matters only if the law has specifically granted such authority. The Texas Election Code allows an election contest for election fraud only if an election officer or other person officially involved in the administration of the election commits the alleged fraudulent act. The petition circulators do not formally qualify as election officers. After performing a statutory construction analysis, the court determined the circulators also do not qualify as a person "officially involved in the administration of the election." As a result, the trial court properly granted the plea. The court declined to allow Johnson the ability to replead. However, the court noted that since the trial court lacked jurisdiction, it lacked the authority to enter an order on the summary judgment.

Charter Election: ***Nelson v. Head*****, No. 13-18-00484-CV, 2019 WL 6315425 (Tex. App.—Corpus Christi Nov. 26, 2019) (mem. op.)**. In 2013, the voters amended the city charter for Bay City to limit councilmembers and the mayor from serving more than three consecutive terms. In 2018, resident Robert Head filed suit against the city, the mayor, and two councilmembers alleging that non-voter approved language was erroneously added to the city charter that identified the mayor as a councilmember. Head claimed that the provision destroyed the separation of powers between the executive and legislative branches of government. Among other things, Head sought a declaration that the charter provision is invalid, argued that the mayor engaged in ultra vires conduct by voting in council meetings, argued that the mayor is subject to the term limits adopted in 2013, and that two councilmembers were reelected in

violation of the term limit provision of the charter. The trial court denied the city's plea to the jurisdiction and the city appealed.

During the pendency of the appeal, the city passed an ordinance striking the complained-of language from the charter and the voters elected to amend the charter by changing from a mayor-council form of government to a council/mayor-manager form of government, thus making the mayor a voting member of city council.

The appellate court reversed the trial court and rendered a dismissal for lack of jurisdiction after deciding virtually every issue in favor of the city and city officials. First, about the claims against the mayor, the court held that Head failed to allege enough facts demonstrating how the mayor's ultra vires votes caused him concrete, particularized injuries distinct from the effect on the general public. Further, the court held that Head's ultra vires claims were barred by governmental immunity.

As for Head's claims against the councilmembers, the court held the true nature of Head's claims were the basis for a quo warranto proceeding, and Head did not have standing to bring them outside of the quo warranto procedure. In addition, Head failed to meet the narrow taxpayer exception to standing regarding his claims against the councilmembers.

Election Language: ***In re Blythe,*** **No. 03-19-00577-CV, 2019 WL 4068571 (Tex. App.—Austin Aug. 28, 2019) (mem. op.)**. This is a petition for a writ of mandamus in which the realtor contends that the court should order the City of Austin to delete certain language from the ballot.

Blythe filed a writ of mandamus asserting that the court should order the city to delete the phrase "at an election for which the City must pay" from the ballot language because it implies that the city will necessarily incur additional election costs to comply with the voter-approval provisions contained in a proposition to adopt a citizen-initiated ordinance.

The court of appeals denied the writ finding that the proposed ordinance did not include language that limited voter approval to the "next required uniform election date." The court determined that the language in the proposed ordinance was ambiguous and could be read to require voter approval at the next uniform election date, whether or not the city was already planning an election on that date. Thus, the inclusion of the phrase "at an election for which the city must pay" in the ballot language is not misleading. As a result, the court denied the writ.

Election Language: ***In Re Linder,*** **No. 03-19-00553-CV, 2019 WL 3978582 (Tex. App.—Austin Aug. 22, 2019) (mem. op.)**. This is a mandamus action seeking modification of ballot language of a proposition to adopt a citizen-initiated ordinance.

Linder and approximately 31,900 registered voters signed a citizen-initiated petition proposing an ordinance regarding the City of Austin's use of revenue from hotel-occupancy taxes. The proposed ordinance generally required the city to spend 15 percent of hotel occupancy taxes on cultural arts and 15 percent on historic preservation; limit its spending on the convention center to 34 percent of the hotel-occupancy tax revenue; spend the remaining hotel-occupancy tax revenue to support and enhance the city's cultural tourism industry; and obtain voter approval for the convention center improvement and expansion costing more than $20 million. The petition

was certified, and the city prepared the ballot language that referenced "voter approval for Convention Center improvements or expansions of more than $20 million at an election for which the city must pay." Linder filed a suit for mandamus asking the trial court to order the city to correct the ballot language so that it adequately describes the ordinance proposed by the citizen-initiated petition. Linder argued that the proposed ballot language includes extraneous and misleading information regarding election costs and fails to inform voters that under the proposed ordinance, hotel-occupancy tax revenue would be redirected from the convention center to cultural, arts, and other tourism-related programs.

The court found that the ballot language affirmatively misrepresents future election costs associated with the ordinance because there is no requirement under the proposed ordinance that the election to approve the convention center's improvement and expansions costs of more than $20 million be held within a given time. Additionally, the court found that the ballot language omits a chief feature of the proposed ordinance – that the ordinance would require the city to prioritize the spending of hotel-occupancy tax revenue on arts, historic preservation, and the city's cultural tourism industry. As a result, the court found that the city had abused its discretion.

Election Language: ***Perez v. Turner*****, No. 01-16-00985-CV, 2019 WL 5243107 (Tex. App.—Houston [1st Dist.] Oct. 17, 2019)**. This is a long-standing/multi-opinion dispute challenging the City of Houston's drainage fee ordinance. In this substituted opinion (substituted for an opinion issued in August of 2018), the First District Court of Appeals affirmed the granting of the city's plea to the jurisdiction.

Voters in the City of Houston adopted a dedicated charter amendment for a "Pay-As-You-Go Fund for Drainage and Streets." The city then adopted a regulatory ordinance. One source of funding was a charge imposed on properties directly benefitting from the drainage system. The ballot language for the charter amendment was originally held misleading and invalid. After several disputes from the subsequent ordinance occurred, Perez brought this ultra-vires claim and sought: (1) a judgment declaring the drainage fee ordinance invalid (yet again); and (2) an injunction against the assessment, collection, and expenditure of taxes and fees pursuant to the ordinance, and reimbursement "on behalf of herself and all other similarly situated persons or entities" of taxes and fees assessed and collected pursuant to the ordinance and paid "under duress." The city filed a plea to the jurisdiction asserting Perez lacked standing because she had suffered no particularized injury separate from the public, which was granted. Perez appealed.

The prior judicial declaration that the charter amendment is void does not address the Drainage Fee Ordinance. Thus, to the extent that Perez's claims were based on her allegations that the prior opinions invalidated the ordinance, such are misplaced. The charter amendment was only needed to shift a portion of ad valorem tax revenue from debt services and was not required for authority to pass a drainage fee ordinance. Local Government Code Chapter 552 provided independent authority for such an ordinance. Perez pleaded that she paid "illegal" drainage fees, she has cited to no authority declaring the Drainage Fee Ordinance illegal. Further, Perez must demonstrate she "suffered a particularized injury distinct from that suffered by the general public" by the drainage fees collected. The municipal fees were assessed to property owners

across the city. The payment of municipal fees, like the drainage fees assessed against Perez's properties and numerous other properties in the city, did not constitute a particularized injury. Taxpayer standing is an exception to the "particularized injury" requirement. However, it is not enough for the plaintiff to establish that she is a taxpayer; the plaintiff "may maintain an action solely to challenge proposed illegal expenditures." A litigant must prove that the government is expending money on the activity that the taxpayer challenges; merely demonstrating that tax dollars are spent on something related to the allegedly illegal conduct is not enough. Perez asserted the fees were collected illegally. However, she was unable to establish the city is making any "measurable, added expenditure" of funds on illegal, unconstitutional, or statutorily unauthorized activities. As a result, she was not entitled to taxpayer standing. The plea was properly granted.

Charter: *Kilgore v. City of Lakeway*, No. 03-18-00598-CV, 2020 WL 913051 (Tex. App.—Austin Feb. 26, 2020) (mem. op.). This is an appeal of the granting of a plea to the jurisdiction in a case involving a charter amendment in which the court of appeals affirms the trial court's order.

In 2014, voters approved amending the city charter to extend the mayoral and city council terms of office from two to three years. After the change was adopted, the city realized that the charter still contained a provision that required members of council to be elected at large by plurality vote in violation of the Texas Constitution, which requires a home-rule city that has council terms that exceed two years to elect its members of council by a majority vote. In response, the city contacted the Texas Secretary of State (SOS) for advice. The SOS recommended that the city pass an ordinance postponing implementation of the three-year terms until the at-large system could be replaced with a place system, necessary to facilitate a majority-vote system, and from the 2018 election and forward, the city pass an ordinance to assign place numbers to the council members. Once this was done, the charter amendment could be implemented, and the councilmembers could be elected by majority vote for three-year terms.

In April 2018, the city passed an ordinance suspending the charter amendment until the city either established a place system or amended the charter, and provided that the May 2018 election would be conducted under the plurality system. The city never implemented a place system for its council as recommended by the SOS. Instead, in May 2018, the city passed another ordinance providing that it had just conducted an election for the city's mayor and two council seats for the purpose of realigning the terms of the mayoral and council seats. The mayor was declared to be serving as a holdover since 2017, two councilmembers would serve as holdovers until their seats were filled by a special election in November 2018, two councilmembers were realigned from three-to-two year terms ending in 2019, and two terms did not need realignment. The ordinance also provided that the two council candidates receiving the highest number of votes in the November 2018 special election would serve two-year terms and an election in May 2019 would elect the mayor and three councilmembers for two-year terms. In July 2018, the city passed an ordinance ordering a special election in November 2018 to elect two councilmembers.

Kilgore sued the city and its elected officials in their official capacities seeking to enjoin the November 2018 special election. The city filed a plea to the jurisdiction asserting that Kilgore lacked standing to bring suit. The trial court granted the plea to the jurisdiction. Kilgore appealed. The court of appeals determined that Kilgore's complaints about the postponement of the charter amendment were not moot because the at-large plurality voting of councilmembers for two-year terms was still ongoing and would continue with each subsequent city council election. However, because the charter amendment was void and of no legal effect as it conflicted with the Texas Constitution, it could not be implemented. Additionally, the court found that Kilgore did not have standing to bring the lawsuit as he did not allege some injury distinct from that sustained by the public at large. Accordingly, the court affirmed the trial court's order.

EMPLOYMENT (Age Discrimination, Civil Service; Collective Bargaining; Harassment; Whistleblower, Workers Compensation)

Workers' Compensation: *Orozco v. County of El Paso*, No. 17-0381, 2020 WL 1321473 (Tex. Mar. 20, 2020). This is a workers' compensation case, but the key issue is whether the deputy who died in a vehicular accident while driving his assigned patrol car was in the course and scope of his employment. The Supreme Court of Texas held he was within the course and scope.

Orozco was killed instantly when a wheel from another vehicle came loose and crashed through his patrol car's windshield on the expressway. At the time of his death, Orozco was a sergeant with the El Paso County Sheriff's Department. However, Sergeant Orozco was not scheduled to work for the department that night. He instead worked an extra-duty assignment at a University of Texas El Paso (UTEP) football game. Because the work at UTEP was extra-duty employment (and not considered off-duty) and might entail the use of an officer's law-enforcement powers under the policy manual, Sergeant Orozco wore his uniform, badge, and gun to the football game. He also drove there in his assigned patrol car. After completing his work at the UTEP football game, Sergeant Orozco also used the patrol car for his return trip home, which is when the accident occurred. His surviving spouse filed a claim under the Worker's Compensation Act. The county asserts the claim should be denied. All procedural administrative steps were taken, and suit was filed. The court of appeals ruled in favor of the county and the widow appealed.

The Supreme Court of Texas recently held the question of whether an officer is on or off duty does not determine whether the officer's conduct falls within the scope of his employment. "Peace officers are . . . relatively unique among governmental employees as they may be required to spring into action at a moment's notice, even while off duty." Because a peace officer is always a peace officer, even during off-duty hours, the capacity in which an officer is acting can be nebulous. While the parties made arguments regarding his status at the football game, the court held that was not the focus. It is Sergeant Orozco's use of his patrol car for travel from that approved employment to his home that is at issue.

As a rule, travel to and from work does not originate in the employer's business and, in some instances, is expressly excluded from the course and scope of employment by statute. While exceptions may have previously existed for travel that is an integral or required part of the employee's work, the legislature has since codified its definition of course-and-scope which controls. The court analyzed a lot of the record and testimony and determined that Orozco's "use" of the vehicle was authorized and not purely for personal use. Further, the statutory test asks whether the activity producing injury relates to, originates in, and furthers the employer's business affairs. The operation of a marked patrol car on the public streets is an activity that clearly relates to and originates in the work or profession of the El Paso County Sheriff's Department. Patrolling El Paso's roads is a significant part of the department's work. Moreover, having uniformed deputies in marked patrol cars on El Paso streets furthers the work of the sheriff in preserving the peace.

The statutory definition of the term "course and scope of employment" excludes two types of travel—the coming-and-going rule and the dual-purpose rule. Travel to and from work is governed solely by the coming-and-going rule, while all other travel is subject to the dual-purpose rule. Here, it appears undisputed that Orozco "contacted the Sheriff's dispatch as he left the extra-duty assignment that he was in route to his home and available for calls." After analyzing numerous parts of the record which made clear he was subject to call while driving home and was required to respond to emergencies if observed, the court concluded that the authorized operation of Orozco's patrol car to and from the approved extra-duty assignment was a law enforcement activity similar to his on-duty work for the county. As a result, his death occurred during the course and scope of his employment.

Whistleblower Act: *City of Madisonville v. Sims*, No. 18-1047, 2020 WL 1898540 (Tex. April 17, 2020). This is a Texas Whistleblower Act case where the Supreme Court of Texas held the 90-day deadline for filing suit is jurisdictional.

David Sims was a police officer in the Madisonville Police Department. Sims received information that his boss, Sergeant Jeffrey Covington, planned to plant drugs in Covington's ex-wife's car to assist in his ongoing child-custody dispute. Sims and Covington had a bad history, both before and during Covington's time at Madisonville PD. Sims told the Chief of Police, Charles May, but Chief May dismissed the information. Sims later discovered, by using an administrator access login, that Covington was compiling an "investigative file" on Sims presumably to have him fired. Sims was "dishonorably discharged" shortly afterwards for violating the department's computer-use policy. The dishonorable designation was later changed to honorable by a State Office of Administrative Hearings (SOAH) administrative law judge. Sims sued under the Texas Whistleblower Act after the SOAH determination (which was past the 90-day deadline to file suit). The city filed a plea to the jurisdiction, which was granted. The court of appeals reversed, holding the deadline was not jurisdictional. The city appealed.

Texas Government Code Section 311.034 of the Code Construction Act makes statutory prerequisites to suit jurisdictional as to claims against governmental entities. The Supreme Court of Texas has held "the term 'statutory prerequisite' refers to statutory provisions that are mandatory and must be accomplished prior to filing suit." When a statutory prerequisite to suit is

not met, "whether administrative (such as filing a charge of discrimination) or procedural (such as timely filing a lawsuit)," the suit may be properly dismissed for lack of jurisdiction.

The Whistleblower Act clearly and unambiguously waives governmental immunity to allow plaintiffs to obtain relief, but an employee with a Whistleblower Act claim must strictly abide by the procedural limitations set out in the Act to obtain relief, including the statute of limitations. The Act states the employee "must sue" within ninety days. The ninety-day filing deadline is thus a jurisdictional statutory prerequisite to suit. The plea should have been granted.

Civil Service: ***Nix v. City of Beaumont*****, No. 09-18-00407-CV, 2019 WL 4891704 (Tex. App.—Beaumont Oct. 3, 2019) (mem. op.)**. This is an interlocutory appeal in a firefighter suspension case where the Beaumont Court of Appeals affirmed the granting of the City of Beaumont's plea to the jurisdiction.

Nix filed a petition seeking declaratory and equitable relief against the city based on his indefinite suspension from his position as a firefighter. He asserted the Collective Bargaining Agreement (CBA) was invalid because the city allegedly failed to comply with the Texas Open Meeting Act (TOMA) requirements when the CBA was negotiated. He also asserted the "last chance" agreement he entered into with the fire chief was invalid. Nix's last-chance agreement probated part of the suspension but noted he could be terminated if he violated any terms of the agreement. Nix's suspension in 2015 resulted in the last-chance agreement and the chief determined he violated the sick leave policy in 2017 resulting in an indefinite suspension. Nix asserted in the absence of a valid contract, the suspensions were invalid, depriving him of due process of law and a protected property interest. The city filed a plea to the jurisdiction, which was granted. Nix appealed.

TOMA has a limited waiver of immunity. An action taken in violation of TOMA is voidable, not void. When a department head suspends a firefighter for violating a civil service rule, the suspension may be for a reasonable period not to exceed fifteen calendar days or for an indefinite period. TEX. LOC. GOV'T CODE § 143.052(b). The firefighter may accept the suspension or appeal to the civil service commission. If the firefighter disagrees with the commission, the employee may file suit in district court. The question of whether the city posted the CBA 2012-2015 negotiations in accordance with TOMA is not relevant because it is the CBA 2015-2020 that is applicable to his underlying challenge to his indefinite suspension in 2017. The city provided evidence showing proper postings for the negotiation of the 2015-2020 CBA. When Nix accepted the last-chance agreement in 2015, he had the opportunity to refuse the chief's offer and appeal his suspension to the commission; however, Nix agreed to waive his right to appeal, including the right to appeal the chief's 2017 decision determining that Nix had violated the agreement. Nix waived all rights he may have to file suit against the city as to any issue directly or indirectly related to the last-chance agreement or to his indefinite suspension. As a result, the trial court properly granted the plea.

Harassment: ***Toldson v. Denton Indep. Sch. Dist.*****, No. 02-18-00394-CV, 2019 WL 6205245 (Tex. App.—Fort Worth Nov. 21, 2019) (mem. op.)**. This is a sexual harassment/retaliation

claim where the Fort Worth Court of Appeals affirmed the employer's motion for summary judgment.

Toldson worked for Denton Independent School District (DISD) as a paraprofessional teacher's aide off and on from 2009 until he was terminated in February 2015. In 2014, Toldson served as an aide in the special education department at Ryan High School (RHS). Toldson complained to the assistant principal several times that the teacher (Ms. Winrow) was overly demanding and that Toldson did not know what was expected of him in the classroom. Toldson made no allegations during these meetings that Winrow had sexually harassed him. Toldson continued these complaints for several months until he eventually mentioned what he felt was inappropriate sexual comments. DISD offered to move Toldson to a different classroom while investigating his complaints. The principal interviewed five witnesses and did not find any who corroborated Toldson's allegations of sexual harassment. The principal concluded the investigation and offered to move Toldson to another teacher, to which Toldson objected. Toldson complained to the DISD human relations department and asserted his immediate supervisors began retaliating against him by requiring him to be at department meetings where Winrow would be present. Toldson followed the grievance procedures, but with no resolution he would accept. During this entire time, Toldson's job performance at RHS was an issue, including often arriving late for work, leaving early, and numerous absences, all without providing proper notification to his superiors. He also took longer breaks than allowed, as well as unauthorized breaks that left students unsupervised. Toldson was reassigned to a different campus. While there, the record reflects Toldson sexually harassed a female teacher. Upon learning of the incidents, DISD terminated Toldson. Toldson sued for sexual harassment and retaliation. The DISD filed a motion for summary judgment, which was granted. Toldson appealed.

Regarding his retaliation claim, the court noted Toldson identified no evidence establishing causation. While Toldson asserts an email present somewhere in the record constitutes direct evidence of causation, Toldson failed to identify, cite, or adequately brief the email for the court. Toldson bore the burden of supporting his contentions with appropriate citations to the record. Toldson failed to meet those burdens. Further, the court agreed DISD presented evidence of a legitimate, non-retaliatory reason for terminating Toldson's employment. Toldson failed to demonstrate a fact issue exists regarding pretext. The court likewise had difficulty finding Toldson had properly briefed and identified arguments and issues regarding the sexual harassment claim. The court noted the summary judgment record in this case exceeds 2,000 pages. Of the nineteen sentences of alleged facts Toldson relies upon to show a fact issue the sexual harassment charge, eight contain no citation to the record whatsoever and the rest do not explain how they relate to any form of harassment. Toldson provided no reference to a specific place in the record where any exhibits exist, so he failed to brief his issues. The court affirmed summary judgment.

Retaliation: ***Lovelace v. Dallas Indep. Sch. Dist*****., No. 05-18-00207-CV, 2019 WL 2723801 (Tex. App.—Dallas July 1, 2019) (mem. op.)**. This is an appeal in which the court of appeals affirms the trial court's order granting the Dallas Independent School District's (DISD) plea to

the jurisdiction in an employment retaliation claim under the Texas Commission on Human Rights Act (TCHRA).

After her employment was terminated, Jacqueline Lovelace, an African American Executive Director in the DISD, sued DISD under the TCHRA. She argued DISD had retaliated against her for expressing opposition to discrimination. Lovelace argued that it was discriminatory to invite a LULAC representative to discuss complaints about an African-American principal; a parent's decision not to meet with Lovelace could be viewed as racist; her supervisor's meeting with the parent in Lovelace's absence placed her in a position of marginalization; and in an email she sent to her supervisor, her supervisor's actions appeared biased, unethical, and to have a racist tenor directed toward her and the African-American principal. DISD filed a plea to the jurisdiction asserting governmental immunity from suit and arguing that Lovelace's claims did not fall within the waiver of immunity provided by the TCHRA. The trial court granted the plea to the jurisdiction and dismissed Lovelace's suit. Lovelace appealed.

The court of appeals applied the burden-shifting analysis required by *McDonnell Douglas* to the retaliation claim. The court found that Lovelace's email to her supervisor and her later termination satisfied the prima facie case of discrimination element of the burden-shifting framework and that DISD's evidence in its plea to the jurisdiction and supplemental filings rebutted that presumption. However, the court found that Lovelace failed to present evidence raising a question of fact that DISD's stated reasons for terminating her employment were a pretext for retaliatory intent. Therefore, she failed to establish a waiver of governmental immunity under TCHRA.

Workers Compensation: ***City of Dallas v. Thompson*****, No. 12-19-00032-CV, 2019 WL 2710247 (Tex. App.—Tyler June 28, 2019) (mem. op.)**. Following a determination by a hearing officer with the Texas Department of Insurance's Division of Workers' Compensation (DWC) that Gregory Thompson sustained a compensable injury while employed by the City of Dallas, and the subsequent final decision by the DWC, the city ultimately filed suit for judicial review of the hearing officer's determinations and final decision of the DWC. Thompson filed counterclaims complaining that the DWC's determination that the city's notice of denial of compensability was sufficient to contest compensability of the claimed injury. Thompson also requested attorney's fees. The city filed a plea to the jurisdiction challenging the trial court's jurisdiction over Thompson's counterclaims. The trial court denied the city's plea to the jurisdiction regarding Thompson's complaints about sufficiency of the notice but sustained the city's plea as to the counterclaim for an award of attorney's fees. Each side appealed.

On appeal, the city argued that the trial court had no jurisdiction regarding Thompson's failure to seek judicial review of his counterclaims within 45 days after the date the DWC mailed the final decision to the parties as required by Section 410.252 of the Labor Code. The court relies on the Supreme Court of Texas decision from April 2019 in *Tex. Mut. Ins. Co. v. Chicas* to dismiss the city's argument. That decision provided that the 45-day deadline to file suit for judicial review of a DWC decision is not jurisdictional. Therefore, the trial court did not err in denying the portion of the city's plea complaining that Thompson's counterclaims were not timely.

In his cross point, Thompson argued that the trial court erred in granting the city's plea as to his claim for attorney's fees, contending that the legislature intended that cities are to be held liable for attorney's fees pursuant to Section 408.221(c) of the Labor Code. The city argued that governmental immunity protected the city against Thompson's claim for attorney's fees. The court held that the city availed itself of its statutory right to challenge Thompson's award by pursuing an appeal of the administrative decision, and that decision by the city did not result in a loss of the city's governmental immunity from Thompson's claim for attorney's fees. The trial court did not err in sustaining the city's plea as to Thompson's counterclaim for attorney's fees.

Age Discrimination: ***Socorro Indep. Sch. Dist. v. Hamilton*****, No. 08-18-00091-CV, 2019 WL 3214154 (Tex. App.—El Paso July 17, 2019)**. In this Eighth Circuit District Court of Appeals case, the court affirmed the lower court's decision to deny the school district's plea to the jurisdiction because the settlement agreement entered into did not have the effect of creating governmental immunity.

Hamilton had been employed by the Socorro Independent School District (SISD) since 1996. In 2014, Hamilton entered into a contract to work as the head orchestra director at William D. Slider Middle School for the 2014-2015 school year. He was informed sometime later that his contract would not be renewed for the 2015-2016 school year. At this point Hamilton was over the age of forty and believed his nonrenewal was due to age discrimination. After some negotiations with the school district, he signed a "Separation Agreement and Release of Claims." Hamilton released his rights to any federal or state law claims including claims for discrimination under Federal and Texas law in exchange for the school district agreement to pay Hamilton up to the date of his resignation and provide neutral references to prospective employers. A year later Hamilton filed suit against SISD alleging they had breached the settlement agreement by providing references that were not neutral. SISD filed a plea to jurisdiction which was denied at the lower court, asserting that Hamilton's claims were barred by governmental immunity.

The court held that governmental immunity had been waived in this case on Hamilton's age discrimination claim. The court explained that if a claim asserted would have waived governmental immunity at the time that the settlement was signed then entering into the settlement agreement does not create governmental immunity. Further, the settlement agreement acknowledged SISD's exposure to discrimination claims. Hamilton signing the agreement precluded him from asserting his age discrimination claims during the required time frame but did not have the effect of creating governmental immunity.

Civil Service: ***In re Moore*****, No. 03-19-00233-CV, 2019 WL 3023973 (Tex. App.—Austin July 11, 2019)**. This is a writ of mandamus filed by the City of Austin challenging the trial court's order denying the city's motion to quash a subpoena compelling production of police personnel records in a capital murder case.

After a former Austin Police Department (APD) police officer was indicted for capital murder, the police officer's counsel sought to review the personnel files of five former and current APD officers who had investigated the alleged offense. The State served a subpoena duces tecum on

the city seeking production of the requested records. In response, the city filed a motion to quash the subpoena arguing that the records contained confidential material that was not subject to disclosure pursuant to Section 143.089(g) of the Local Government Code. However, the city agreed to tender all confidential records to the trial court to conduct an in camera inspection for *Brady* material that may be contained in the confidential records. The court denied the motion to quash, including the city's request for an in-camera inspection of the records. The city then filed a petition for writ of mandamus.

The court of appeals granted the writ of mandamus. The court found that the trial court has a ministerial duty to conduct an in camera inspection of the personnel files before determining what, if any, portion of them should be disclosed. The court also concluded that because the city lacked an adequate remedy from the trial court's failure to conduct an in camera inspection, the writ of mandamus was proper. Accordingly, the court ordered the trial court to vacate the order denying the motion to quash; to conduct an in camera inspection; and to enter an order quashing the subpoena to the extent that the subpoena compels production of any materials that the trial court determines are not required to be produced under *Brady*.

Civil Service: *Williams v. City of Austin*, No. 14-18-00262-CV, 2019 WL 3227513 (Tex. App.—Houston [14th Dist.] July 18, 2019) (mem. op.). In this Fourteenth District Court of Appeals case, the court affirmed the district court's decision to grant the city's plea to jurisdiction.

Williams became a police officer with the city in 2008 and in the following years was involved in several incidents that he received suspensions for. The first incident was in 2011 when he was in an altercation while off-duty for which he was suspended and placed on probation. Williams later asked for and received an expunction order for certain information relating to the incident. The second incident occurred in 2013 in which Williams was suspended indefinitely for off-duty dishonesty and negligence of duty. Williams appealed the indefinite suspension to an independent hearing examiner. While the appeal was pending, Williams' name rose to the top of the promotion eligibility list. Officers at the top of the list must be promoted unless there is a valid reason not to promote them. The police chief passed over Williams for promotion three times because of the indefinite suspension that was pending. Williams appealed this decision to an independent examiner as well. In the appeal for the second incident, the examiner upheld the dishonesty charge, shortened the suspension, and Williams was allowed to return to duty. In Williams' promotion appeal, the independent examiner determined that the police chief had a valid reason to pass over Williams, but that the chief had improperly included documents related to the first incident in the materials he presented. Williams appealed that decision and asserted three points on error.

In municipal civil service promotional bypass cases, a police officer may appeal to the Fire Fighters' and Police Officers' Civil Service Commission or to an independent hearing examiner. If a police officer chooses an independent hearing examiner, they lose their right to appeal to the courts unless they can prove that the examiner either was without jurisdiction or exceeded their jurisdiction. Williams asserted that the lower court had jurisdiction because the examiner was sent documents prior to the hearing, the examiner exceeded his jurisdiction because the meet and

confer document preempted several statutes and policies, and the examiner exceeded his jurisdiction by considering expunged documents.

The court held that the electronic submission of documents to the examiner before the hearing did not make the resulting order invalid. Examiners are required to make their decisions based only on evidence at the hearing. There was no evidence that the examiner had viewed the documents before the hearing and even if he had the documents presented at the hearing were the same ones that were submitted. Therefore, his decision was based on documents that were submitted at the hearing.

Next, the court held that all of Williams' arguments regarding preemption were without merit because there was no conflict between the meet and confer document and statutes or policies. Finally, the court held that the examiner did not exceed his jurisdiction because the examiner did not rely on the expunged information when making his decision. The examiner expressly stated in his opinion that he did not consider that information and that it had been improperly included in the materials.

Civil Service: *City of Fort Worth v. O'Neill*, No. 02-18-00131-CV, 2020 WL 370571 (Tex. App.—Fort Worth Jan. 23, 2020) (mem. op.). The Fort Worth Court of Appeals reversed-in-part and affirmed-in-part a trial court order regarding whether the court had jurisdiction over an appeal from a hearing examiner's decision under the Civil Service Act.

Shea O'Neill was indefinitely suspended as a firefighter with the city. O'Neill, while on work-related leave, struck a 70-year-old parent at a football scrimmage with his left hand. The parent alleged he sustained facial injuries, several cracked and broken teeth, and a bloody nose. The fire chief found that O'Neill had violated several fire-department rules and regulations and imposed the suspension. O'Neill appealed and a hearing examiner reversed the suspension. The city appealed to the district court, which granted O'Neill's plea to the jurisdiction holding it had no jurisdiction over the hearing examiner's decision. The city appealed.

The city asserts the district court had jurisdiction to consider the appeal for two reasons: (1) the hearing examiner's decision was procured by unlawful means because she considered evidence not admitted at the hearing, and (2) the hearing examiner exceeded her jurisdiction because she concluded that the fire department's due-process violations compelled her to reinstate O'Neill. The Civil Service Act mandates that a decision be made on evidence submitted at the hearing. A hearing examiner's decision is "final and binding on all parties." An appeal is permitted only if the hearing examiner was without jurisdiction or exceeded his/her jurisdiction or that the order was procured by fraud, collusion, or other unlawful means. It is undisputed the hearing examiner conducted her own independent Internet research on the side effects of certain drugs. O'Neill counters the search results were not "procured" through unlawful means. In ordinary usage, "procure" means to "to cause to happen or be done" and to "bring about." The hearing examiner found the "slap" was defensive in nature and unlikely to have caused the broken teeth or bones and dismissed the nosebleed as being caused by the slap.

The court held a fact issue exists regarding the side-effects evidence and whether it led the hearing examiner to decide that the evidence overall did not support the fire chief's findings and

conclusions. Such was improper and was procured through an unlawful means as the medication issue was not submitted during the hearing as evidence. As a result, the "procured through unlawful means" ground entitled the city to reversal of the order granting the plea and a remand for further proceedings. However, the hearing examiner also determined that the department did not fully investigate the facts and allegations and did not give O'Neill an adequate opportunity to respond to the allegations. Such is within her discretion. Nothing in the Civil Service Act prohibits hearing examiners from reinstating a firefighter based on a finding that the department did not give due process during the disciplinary process. That ground was overruled by the court, even though it still remanded the case.

Harassment: *County of El Paso v. Aguilar*, No. 08-19-00082-CV, 2020 WL 1303556 (Tex. App.—El Paso Mar. 18, 2020). This is a gender discrimination/hostile work environment case where the El Paso Court of Appeals reversed-in-part and affirmed-in-part the denial of the county's plea to the jurisdiction. The 42-page opinion presents a detailed analysis under employment law, including prima facie element analysis and burden shifting.

Aguilar worked for the county in various positions for nearly twenty-four years. She was holding the position of facilities manager when she complained to her supervisors and the human relations department that she was paid substantially less than not only the male who previously held the equivalent position but also less than other similarly situated male coworkers. She also raised the issue of pay disparity with the county commissioner's court. She also complained she was harassed by a male co-worker. The supervisor put restrictions on the co-worker in 2014, limiting contact with Aguilar and her staff. That restriction was lifted five months later, but according to Aguilar, the co-worker, Lucero, resumed his harassing behavior. When Aguilar obtained an email, the supervisor wanted to discuss Lucero with her and her behavior in a meeting where he was present, she experienced an anxiety attack and eventually resigned. Aguilar brought suit under the Texas Commission on Human Rights Act (TCHRA) under a constructive discharge theory. The county filed a plea to the jurisdiction, which was denied.

The court first went through numerous pages regarding the affidavits and determined the trial court did not abuse its discretion in considering Aguilar's affidavit. Next, the court determined Aguilar was required to establish she was "treated less favorably than similarly situated members of the opposing class[.]" The county presented evidence that Aguilar did not hold the same job position, duties and responsibilities, or requirements for education as the comparators she listed. The applicable test is not whether the positions are comparable in some respects; the test is whether the positions are "comparable in all material respects." While Aguilar's burden at the prima facie stage was not onerous, it did require, at a minimum, that she present evidence raising a fact issue on whether she was similarly situated to members outside her protected group who were treated differently. She did not present contradicting evidence as to two other managers, but did as to a third, Cruz. As a result, the plea should have been granted as to disparate regarding the first two managers but was properly denied as to Cruz.

As far as the harassment claim goes, the county argues that Lucero's comments did not create a hostile work environment because many of them were made to persons other than Aguilar. But those comments were made about Aguilar and were humiliating to her. In addition, because

many of the comments were made to her staff and to contractors with whom she worked, they interfered with her ability to perform her job duties. Aguilar demonstrated that a disputed material fact existed concerning whether her work environment was objectively hostile or abusive. While the restrictions on Lucero were put in place, they were lifted five months later, and he returned to his prior behavior. While the county asserts it did not have time to respond to the return, Aguilar's hostile work environment claim is not based solely on the final week of her employment, divorced from the years of harassing conduct that preceded that week. A reasonable person could conclude that this failure effectively communicated to Aguilar that Lucero would be permitted to once again humiliate Aguilar and interfere with her job performance.

As to Aguilar's retaliation charge, she asserted after complaining about Lucero, her supervisor sent her an email accusing her of inappropriate behavior in a meeting. When her supervisor emailed her to discuss "next steps" she took that to mean discipline of her, so she resigned. The totality of the circumstances surrounding Aguilar's hostile work environment claim created a fact issue as to whether retaliation was committed by the county for reporting harassment. However, no fact issue exists regarding Aguilar's retaliation charge for reporting disparate pay. In sum, the plea was properly denied as to some claims, but should have been granted as to others.

Harassment: *City of Coldspring v. Boudreaux*, No. 09-19-00251-CV, 2020 WL 1465977 (Tex. App.—Beaumont Mar. 26, 2020) (mem. op.). Suzann Boudreaux sued her employer, the City of Coldspring, alleging that the city, by and through the actions of its Alderman, Greg Vore, engaged in sex discrimination and workplace harassment in violation of the Texas Commission of Human Rights Act (TCHRA). Specifically, Boudreaux alleged that:

> during a city council meeting on November 5, 2018, Vore stood up during open session and slapped on the table in a threatening manner and untruthfully shouted that Boudreaux was a liar.

during a November 5, 2018, city council meeting, Vore yelled at Mayor Pat Eversole, stating "I don't like you and I can't stand to look at you." Immediately following the meeting, Alderman Charles Altman told Eversole that she should fix her hair and nails so that it would not be so difficult for Vore to look at her.

Aldermen openly discussed and questioned why a female citizen of African American heritage would want to serve on city council.

On numerous occasions, Altman entered city council announcing that "his balls are on the table," and Vore stated that "he was looking for a set of pink balls for the Mayor so she could have some[.]"

While discussing a ticket that a Texas Department of Public Safety Trooper had issued to a citizen, Vore used a racial epithet. Boudreaux and Eversole were present when Vore made the statement, and Boudreaux alleged that Vore intended his statement not only as a racial slur, but also as a bullying and demeaning statement because Vore knew that Mayor Eversole was in a relationship with an African American.

Vore frequently patted his hips and warned, in an intimidating fashion, that he had a firearm.

Vore openly commented about the difficulties of a female citizen who was riding a bike, stating that she was so "fat you couldn't see the bike seat and she was barely moving."

The city filed a plea to the jurisdiction which was denied by the trial court. The city appealed and argued that the trial court erred in denying its plea to the jurisdiction because Boudreaux failed to plead a prima facie gender-based hostile work environment claim under Section 21.051 of the Labor Code. The city argued that it was immune from suit under the TCHRA because Boudreaux failed to plausibly plead or raise a fact issue on any of the essential elements of her claim.

The appellate court found that, although Boudreaux's evidence showed that she was subjected to repeated and ill-mannered behavior, the instances that she alleges do not amount to the quality or severity of misbehavior sufficient to subject Boudreaux to hostile or abusive conditions which materially alter her conditions of employment. Additionally, Boudreaux did not show that Vore calling her a liar was based on her gender or was part of a pattern of gender-based harassment. And the mere utterance of an epithet that engenders offensive feelings in an employee does not sufficiently affect the conditions of employment to create a hostile work environment. The court concluded that all of Boudreaux's evidence, taken together, failed to demonstrate that her working conditions were so severely degraded and fraught with discriminatory hostility or abuse as to warrant invocation of the TCHRA's protections. Thus, the city's immunity was not waived and the trial court's denial of the city's plea to the jurisdiction was reversed.

Boudreaux also sued Alderman Vore, individually, for defamation, defamation per se, slander, and intentional infliction of emotional distress. The trial court denied Vore's motion to dismiss. Vore appealed. On appeal, he argued: (1) he had official and legislative immunity; (2) Boudreaux failed to state a prima facie case for her defamation and defamation per se claims; and (3) Boudreaux failed to state a prima facie case for her claim of intentional infliction of emotional distress, and that the tort is barred as a "gap-filler" tort. Vore also complained that the trial court improperly awarded attorney's fees to Boudreaux.

The appellate court concluded that because Vore established by a preponderance of the evidence that Boudreaux's claims are based on, relate to, or are in response to his exercise of free speech, and because Boudreaux failed to establish a prima facie case for each essential element of her claims, the trial court erred by denying Vore's motion to dismiss under the Texas Citizens Participation Act (TCPA). The trial court's ruling was reversed and remanded to the trial court with instructions to enter judgment dismissing all of Boudreaux's claims against Vore and, after notice and a hearing, to award Vore his damages and costs as provided by the TCPA.

Whistleblower Act: *Reding v. Lubbock Cty. Hosp. Dist.*, No. 07-18-00313-CV, 2020 WL 1294912 (Tex. App.—Amarillo Mar. 18, 2020) (mem. op.). This is a Texas Whistleblower Act case where the Amarillo Court of Appeals affirmed the granting of the hospital district's plea to the jurisdiction.

Reding is a registered nurse working for the Lubbock County Hospital District d/b/a University Medical Center (UMC). UMC announced plans for a new policy that required nurses to sign up

for two mandatory "on call" shifts per month and disciplined those who did not comply. Reding believed the proposed compulsory shifts violated Section 258.003 of the Texas Health & Safety Code, prohibiting a hospital from requiring a nurse to work mandatory overtime. She filed a complaint with the human resources and legal departments. Reding was later terminated. Reding asserted the termination was retaliatory and brought suit under the Texas Whistleblower Act. UMC filed a plea to the jurisdiction which was granted. Reding appealed.

Reding alleged that she "reasonably and in good faith believed that [UMC's] legal department was the appropriate authority to whom she should report the violation." However, the Supreme Court of Texas has consistently held that "reports up the chain of command are insufficient to trigger the Act's protections." To qualify, the internal department must also have outward-looking powers, as an "authority to enforce, investigate, or prosecute violations of law against third parties outside of the entity itself, or it must have authority to promulgate regulations governing the conduct of such third parties." While the legal department at UMC may oversee internal compliance with the law governing nurses' work hours, that is not the same as having the authority to enforce laws against third parties. The plea was properly granted.

Workers' Compensation: *City of Dallas v. Thompson*, No. 12-19-00036-CV, 2020 WL 1443567 (Tex. App.—Tyler Mar. 25, 2020). Greg Thompson was employed by Dallas as a firefighter. After he was diagnosed with testicular cancer in August 2010, Thompson reported the cause of his injury as exposure to carcinogens during his career as a firefighter. The city denied compensability and liability, and ultimately administrative review of the case by the Division of Workers' Compensation of the Texas Department of Insurance (DWC) proceeded pursuant to the requirements of the Texas Workers' Compensation Act. An administrative law judge determined that Thompson suffered compensable injury, and importantly, that the city waived its defense that Thompson didn't file a claim for compensation within one year of the injury because the city did not raise it within a reasonable time period after it became available. After review by a DWC appeals panel, the administrative law judge's ruling became final. The city sought judicial review, where the trial court rendered partial summary judgment determining that the city was not relieved from liability for Thompson's workers' compensation claim. The city appealed.

On appeal, the city contended that the trial court erred because the city did not waive its one-year defense. First, the city argued that the administrative law judge erroneously added the waiver issue at the contested case hearing. On this point, the court determined that the city did not meet its burden to show, as a matter of law, that the administrative law judge erroneously added the waiver issue, since the city's motion for summary judgment makes no mention of the contested case hearing exhibits and the court must presume that the omitted evidence supports the trial court's judgment.

The city next argues that the administrative law judge's determination that the city waived its defense that Thompson failed to timely file his claim because the city didn't raise it within a reasonable period of time after it became available had no basis in law. The court states that workers' compensation appeals panels have for years determined that the defense of the claimant's failure to file within one year must be raised in a reasonable period of time. In this

case, there was a five-year delay between the time that the defense became available and when it was asserted. The court held that inaction for a long period can prove waiver and affirmed the trial court's partial summary judgment.

Collective Bargaining: *City of Houston v. Houston Prof. Fire Fighters' Assoc.*, No. 14-18-00418-CV, 2020 WL 1528078 (Tex. App.—Houston [14th Dist.] Mar. 31, 2020) (mem. op.). The City of Houston and the Houston Professional Fire Fighters' Association, Local 341, entered into a collective bargaining agreement (CBA) that included an agreement to arbitrate certain disputes. After the Houston Fire Department terminated the employment of several firefighters for failure to achieve paramedic certification, a grievance was filed by the association, resulting in arbitration. After arbitration, a trial court rendered summary judgment confirming the arbitration award in favor of the association. The city appealed, contending that the trial court erred in granting the association's summary judgment because the arbitrator: (1) lacked jurisdiction when the association's grievance was untimely; (2) exceeded her jurisdiction by deciding a question that was not before her; (3) modified the law and terms of the CBA at issue; and (4) exceeded her jurisdiction by ordering reinstatement of three firefighters.

Regarding the city's first issue on appeal that the association's grievance was untimely, the grievance procedure outlined in the CBA provided that the association was required to file a grievance within thirty days of the date upon which the association knew or should have known the facts or events giving rise to the grievance. The court held that because the CBA specifically authorized the arbitrator to handle the interpretation and application of the terms of the CBA, this encompassed determining when a grievance must be filed under the CBA. The arbitrator had express authority to determine the fact question relating to whether the grievance was timely, so the court held that the arbitrator did not exceed her authority by deciding the timeliness issue.

The city next argued that the arbitrator exceeded her jurisdiction by determining that the terminated firefighters had a right to an administrative appeal, which was not an issue that was before the arbitrator. The court held that the inability to appeal, or have a hearing concerning termination, was one of the changed consequences not permitted under the CBA. According to the court, the arbitrator maintained the authority to analyze the terms of the agreement as they related to the firefighters' right to appeal.

In its third issue, the city argued that because Local Government Code Chapter 143 generally controls over a CBA, the arbitrator exceeded her jurisdiction by determining that the terminated firefighters should have a post-termination hearing because Chapter 143 does not provide a right of administrative appeal to a firefighter who is terminated for failing to meet conditions of employment. The court held that the city's argument "boils down to a contention that the arbitrator got the law wrong" which is beyond the scope of the court's review. The arbitrator's analysis of the terms of the CBA was within the scope of the arbitrator's authority, so the court overruled the city's third issue.

Finally, the city asserted the arbitrator had no jurisdiction to order reinstatement since the CBA didn't grant the arbitrator the authority to reinstate. The court relied upon common law to

conclude that an arbitrator has broad discretion in fashioning an appropriate remedy, so the arbitrator did not exceed her authority by reinstating the terminated employees.

The court affirmed the trial court's judgment.

Age Discrimination: *City of San Antonio v. Arciniega*, No. 04-19-00467, 2020 WL 214759 (Tex. App.—San Antonio Jan. 15, 2020) (mem. op.). This is an appeal of the trial court's order denying the City of San Antonio's plea to the jurisdiction in a claim for age discrimination.

After Arciniega's employment with the city was terminated, he sued the city alleging age discrimination. The city filed a plea to the jurisdiction asserting that Arciniega's lawsuit was barred because he failed to file his administrative complaint with the Texas Workforce Commission within the required 180 days after the date he was terminated. The trial court conducted an evidentiary hearing, at which the city's witness testified that she contacted Arciniega by telephone on August 2, 2013 and informed him that he was being terminated effective that day, and that written notice would be mailed to him. Arciniega testified that he received a voicemail from the city stating that documentation was being forwarded to him and that he signed a "green card" acknowledging receipt of the notice of termination on August 10, 2013. Based on this hearing, the trial court denied the city's plea. The city appealed.

The court of appeals concluded that when a defendant asserts and supports with evidence that the trial court lacks subject matter jurisdiction, and the facts underlying the merits and subject matter jurisdiction are intertwined, a plaintiff is only required to show that there is a disputed material fact regarding the jurisdictional issue. Thus, the trial court was required to resolve the jurisdictional issue on the basis of facts that it found during the evidentiary hearing. Additionally, the court found that the trial court was not required to enter findings of facts and conclusions of law. Accordingly, the court affirmed the trial court's ruling.

ETHICS

Ethics: *Becker-Ross v. State*, No. 06-19-00108-CR, 2020 WL 130588 (Tex. App.—Texarkana Jan. 13, 2020). Rosena Becker-Ross, city administrator for the City of Mount Enterprise was found guilty by a jury of three counts of abuse of official capacity for pressuring the city marshal, Parker Sweeney, to write a certain number of traffic tickets within a specified period even though traffic-offense quotas are illegal under Section 720.002 of the Texas Transportation Code. On several occasions, using texts and emails, the city administrator demanded the marshal write more traffic citations because it affected the city's budget, her salary, his salary, and his job. This continued even after the marshal informed the city administrator and the city council of Section 720.002 of the Transportation Code. Eventually, the marshal was fired.

The city administrator appealed her convictions stating that there was not legally sufficient evidence to support the jury's verdict, the trial court erred in not granting her motion to quash because there was inadequate notice of the offense she was charged with, and there was an error in the jury charge. The court of appeals overruled all the city administrator's arguments and affirmed the trial court.

The court stated that the evidence presented to the jury was not legally insufficient because there was plenty of evidence to show the city administrator was subject to Section 720.002 of the Texas Transportation Code. Her argument that she did not have authority over the marshal was not applicable because Section 720.002 did not impose such a requirement. Also, her argument that she did not have the required mens rea to receive a benefit from Section 720.002 was insufficient because the evidence showed that she was the highest paid city official, her salary was paid from the city's budget, and a large part of the budget was based on traffic ticket fines. This showed that she intended to obtain a benefit of maintaining her higher salary by violating Section 720.002.

The court also found that the trial court did not err in not granting the motion to quash since there was adequate notice to the city administrator in the information concerning her intended benefit for the imposition of a traffic-offense quota. The State of Texas was not required to be detailed on how the city administrator benefited since "benefit" is defined in the Texas Penal Code and it is presumed the defendant is on notice of statutory definitions. Also, the State's information tracked the statutory language and set forth each and every element the State was required to prove at trial.

Lastly, the court determined there was no error in the jury charge when the trial court included the laws of parties to the jury charge since the court already determined that there was sufficient evidence showing the city administrator's guilt as a primary party to the offenses and the city administrator, herself, stated that she would not be the only one going down.

FIREARMS

Firearms: *Thomas v. State*, No. 10-17-00138-CR, 2019 WL 4072073 (Tex. App.—Waco Aug. 28, 2019) (mem. op.). In this case, the Waco Court of Appeals overrules challenges to the application and constitutionality of Texas Penal Code Section 46.03's prohibition against possessing a firearm on the premises of a court.

Thomas entered the screening area of the Guinn Justice Center carrying a firearm inside her purse. She was subsequently convicted of carrying a weapon in a prohibited place and sentenced to five years' probation. Thomas challenged her conviction in five issues, three of which involve the application and constitutional validity of Texas Penal Code Section 46.03 which provides, in relevant part: "A person commits an offense if the person intentionally, knowingly, or recklessly possesses or goes with a firearm … on the premises of any government court or offices utilized by the court, unless pursuant to written regulations or written authorization of the court…." Section 46.035(f)(3) defines "premises" as "a building or a portion of a building. The term does not include any public or private driveway, street, sidewalk or walkway, parking lot, parking garage, or other parking area."

Thomas asserts that Section 46.03 is unconstitutionally vague because the definition of "premises" is insufficient to provide notice of what the statute prohibits. The court explains that the term "premises" does not include the exterior of a court facility but does include areas inside a "building or a portion of a building." The common areas inside a building that are adjacent to courtrooms and offices used by the court are clearly part of the definition of "premises." Here,

the security screening area is directly in front of and to the right of the 413th district court. Individuals who pass through the screening area are thus in a portion of the premises of a building housing a government court. In addition, there is a warning sign posted at the bottom of the stairs leading into the Guinn Justice Center. The Waco Court of Appeals overrules this issue.

Thomas also asserts that a judicial decree by the sitting judges of Johnson County that applied 46.03 to the entire Guinn Justice Center violated the separation of powers clause of the Texas Constitution (by usurping the power of the legislature in defining the word "premises"), and is unconstitutional as applied to her. The Waco Court of Appeals overrules this issue, holding that the decree merely applies the language of Section 46.03(a)(3) and 46.035(f)(3) to the Guinn Justice Center, and does not expand the definition of premises.

Thomas also argues that 46.03 does not apply to the entryway to the Guinn Justice Center and that the attempt by the sitting judges to change the definition of "premises" is void and invalid. The court overrules this issue holding that "the plain language of Section 46.003(a)(2), in conjunction with Section 46.035(f)(3), covers the entryway to the Guinn Justice Center where Thomas was found with a firearm."

Overruling all of Thomas's issues, the judgment of the trial court is affirmed.

GOVERNMENTAL IMMUNITY-CONTRACT

Governmental Immunity-Contract: *San Antonio River Auth. v. Austin Bridge & Road, L.P.*, No. 17-0905, 2020 WL 2097347 (Tex. May 1, 2020). In this construction contract dispute, the Supreme Court of Texas held Chapter 271 of the Texas Local Government Code waives immunity for arbitration clauses.

The San Antonio River Authority (Authority) hired Austin Bridge and Road L.P. (ABR) to perform repairs of the Medina Lake Dam. Disagreements about the scope of work and payment arose. ABR triggered the arbitration provision in the contract. When the arbitrator denied the Authority's assertion it was immune, it sued ABR in district court seeking a declaration the Authority lacked the ability to waive immunity for arbitration. The trial court denied the Authority's summary judgment. The court of appeals reversed in part, holding that while the arbitration provision was enforceable, only a court could determine immunity was waived. The Authority appealed.

Until the waiver in Chapter 271 existed, governmental immunity shielded a local government from enforcement of its contract obligations. Currently, Section 271.154 expressly provides that arbitration agreements are enforceable. The term "Adjudication" in Chapter 271 means "the bringing of a civil suit and prosecution to final judgment . . . and includes the bringing of an authorized arbitration proceeding…." Further, an arbitration is an "adjudication procedure" under the plain meaning of the statute. However, immunity is waived only to the extent authorized by Chapter 271. As a result, the Authority was authorized to agree to arbitrate disputes arising from its contract with Austin Bridge, within Chapter 271's expressed limits. However, the Supreme Court of Texas agreed with the court of appeals and held the judiciary has a non-delegable duty to determine whether immunity has been waived. Because immunity

bears on the trial court's jurisdiction to stay or compel arbitration, and to enforce an arbitration award in a judgment against a local government, a court must decide whether governmental immunity is waived. An agreement to arbitrate is unenforceable against a local government to the extent it purports to submit immunity questions to an arbitrator.

The court then analyzed the contract and determined that while the contract was for the benefit of a river district, it also provided a benefit to the Authority and the Authority is the entity that entered into the contract. As a result, in this situation, the Authority's immunity is waived. The court held the decision of whether ABR is seeking actual damage or consequential damages is not factually developed, although, ABR at least pled some possibility the damages sought are actual damages.

Governmental Immunity-Contract: ***Torres v. Dallas/Ft. Worth Int'l Airport*****, No. 05-18-00675-CV, 2019 WL 4071994 (Tex. App.—Dallas Aug. 29, 2019) (mem. op.)**. This is an interlocutory appeal of the trial court's order granting Dallas-Fort Worth International Airport Board's (DFW) plea to the jurisdiction in a breach of contract claim.

Torres entered into a contract to provide human resources consulting services to Pursuit of Excellence (POE), a corporation that contracted with DFW to provide operations services. In July 2016, POE filed suit against Torres for breach of contract, breach of fiduciary duty, misappropriation of trade secrets, unjust enrichment, tortious interference with contract and business relationships, and commercial disparagement. Torres filed an answer, denying the claims, asserting counterclaims against POE, and added third-party claimants, including DFW. DFW filed a plea to the jurisdiction asserting governmental immunity from tort and contract claims. The trial court granted the plea. Torres appealed.

The court of appeals determined that the operation of DFW airport is a governmental function as a matter of law, and immunity applies. The court also concluded that the waiver of immunity for breach of contract under Section 271.152 of the Local Government Code does not apply because DFW did not directly contract with Torres. The court overruled Torres' remaining issues as they were not properly before the court. Accordingly, the court affirmed the trial court's grant of DFW's plea to the jurisdiction.

Governmental Immunity-Contract: ***Wasson Interests, Ltd. v. City of Jacksonville*****, No. 12-13-00262-CV, 2019 WL 7373851 (Tex. App.—Tyler Dec. 31, 2019) (mem. op.).** [Note: Wasson filed a motion for rehearing after the court's August 30, 2019 opinion. The court overruled the motion for rehearing, withdrew its opinion and judgment from August 30, 2019, and substitutes this new opinion and corresponding judgment in its place. In the new opinion, the court rejected Wasson's arguments on rehearing as untimely and not proper grounds upon which to reverse the trial court's summary judgment.]

After the Supreme Court of Texas held in 2016 that the proprietary-governmental dichotomy applied to breach of contract cases, it remanded this case back to the Tyler Court of Appeals to address the merits of the city's initial no-evidence motion for summary judgment.

The basic fact pattern is as follows. Wasson Interests, Ltd. (Wasson) was the successor in interest of a 99-year lease of city property specified for residential use for two separate lots – lot 43 and lot 46. Wasson began leasing the property for one week at a time. The city sent an eviction notice holding the short-term rentals constituted a commercial use of the property in violation of the lease. The city agreed to excuse past violations and cancel the eviction in exchange for Wasson entering into a reinstatement agreement under which the city imposed more specific conditions concerning the property's acceptable uses and occupancy limitations. Later, the city discovered an advertisement to rent the home on lot 43. The city sent notice to Wasson that the advertisement and rental terms violated the reinstatement agreement and that the city would terminate the leases if Wasson failed to cease all commercial activity within ten days. The city ultimately sent an eviction notice and Wasson sued the city for breach of contract. The city filed a traditional and no-evidence summary judgment which the trial court granted, and Wasson appealed.

After remand from the Supreme Court of Texas, the court of appeals considered Wasson's argument that the trial court erred when it granted summary judgment in favor of the city due to a fact issue on Wasson's breach of contract and wrongful eviction claims. The city alleged that Wasson breached the reinstatement agreement in three ways: (1) Wasson advertised the properties online for use as a vacation rental; (2) Wasson's rental scheme obligated a renter to stay a minimum of only one week (instead of 30 days); and (3) Wasson allowed its employees to stay at the properties in consideration for their labor. The court addresses whether Wasson carried its burden to create a fact issue by producing more than a scintilla of evidence that it did not materially breach the reinstatement agreement.

The reinstatement agreement expressly prohibited the advertisement. Nevertheless, Wasson advertised the house on lot 43 on VRBO.com. The court held that the advertisement constituted not only a breach of the agreement, but also authorized the city to terminate the leases and evict Wasson on lot 43. (Note: although Wasson didn't carry its burden to show a fact issue regarding the advertisement for the lot 43 property, no advertisement for lot 46 was in the record, so Wasson presented more than a scintilla of evidence that complied with the reinstatement agreement's advertisement provision as to the lot 46 property.)

The court also sided with the city's contention that the rental scheme's obligation that a renter stay a minimum of only one week violated the reinstatement agreement. In doing so, the court again referenced the online advertisement for the property on lot 43. The agreement required any rentals to have a term that exceeded 30 consecutive days. Wasson did not offer sufficient evidence showing that it did not breach the 30 consecutive day requirement in the agreement in relation to the property on lot 43. Again, without any advertisement pertaining to the property on lot 46 in the record, Wasson raised a fact issue as to whether the city's termination of the lease for lot 46 and eviction was improper.

The reinstatement agreement also prohibited Wasson from renting the property as a vacation home "whether rent is paid in money, goods, labor, or otherwise." The city claimed that Wasson violated the agreement for both lots when it allowed employees to stay at both properties in consideration for their labor. But the court found no evidence in the record that Wasson allowed

employees to stay at the property in consideration for their labor. The only evidence in the record showed that Wasson allowed employees to stay at the property gratuitously at times. The city therefore was without cause to terminate either lease or evict on this ground.

For the reasons stated above, the court held the city was authorized to terminate the lease and evict Wasson on lot 43, but Wasson raised a fact issue concerning the city's termination of the lease and eviction on lot 46. The court affirmed the trial court's order in relation to lot 43 but reversed the trial court's order and remanded as to lot 46.

Finally, Wasson argued that it should retain the equity for the improvements made to the city's land even if it violated the reinstatement agreement. Although Wasson was lawfully evicted from the property on lot 43, the court held that it would be inequitable for the city to retain the full value of the improvements made by Wasson to lot 43. According to the court this case represents an "unusual scenario" in which the city provided only the land and the leases authorized the tenant to construct permanent homes and other improvements. The city would be unjustly enriched to retain the full value of the extensive improvements without providing any compensation to Wasson. The court remanded the issue to the trial court to determine the amount of equitable reimbursement due to Wasson for the improvements to lot 43.

Governmental Immunity-Contract: *Naismith Engineering, Inc. v. City of Aransas Pass*, No. 13-18-00402-CV, 2019 WL 4493699 (Tex. App.—Corpus Christi September 19, 2019) (mem. op.). This is a governmental immunity/contract case where the court affirmed the granting of the city's plea to the jurisdiction.

The city manager, with council approval, entered into a contract with Naismith Engineering, Inc. (NEI) to design improvements to the boat-ramp area of the city's Conn Brown Harbor (CBH project). The city sued NEI and its surety alleging there were deficiencies related to the CBH project. NEI subsequently counterclaimed to recover outstanding fees for "general work" performed. NEI alleged that "[NEI] performed work ranging from general project services to general harbor engineering and planning and services for waterline extension…." The city filed a plea to the jurisdiction as to the counterclaim, which was granted. NEI appealed.

The court declined to "apply the common law of contracts to a governmental immunity question" and held no contract existed for "general services" between the city and NEI. Therefore, no waiver of immunity existed. NEI attempted to argue its counterclaim included unpaid fees for the CBH project; however, the evidence and statements of counsel made it clear the counterclaim was for other work which was simply near and around the boat ramp. A governmental entity retains immunity from suit as to those claims for monetary damages that are not germane to, connected with, and properly defensive to the entity's claim. The counterclaim does not arise from the same transaction or occurrence that is the subject matter of the city's claim and therefore no immunity is waived. The plea was properly granted.

Governmental Immunity-Contract: *City of Tyler v. Owens*, No. 12-16-00128-CV, 2019 WL 3024756 (Tex. App.—Tyler July 10, 2019) (mem. op.). In this interlocutory appeal, the Twelfth District Court of Appeals affirmed the lower court's denial of a plea for jurisdiction because the City of Tyler waived its governmental immunity through proprietary contracting.

The city owns the property around Lake Tyler which it leases out to people for the purpose of building lake houses. The Chatelains lease property on the lake that is pie-shaped and is located between property owned by the Owens and the Terrys. The Chatelains wanted to build a boathouse and dock. Because of the shape of their property they had a limited waterfront which resulted in their neighbor's claiming that the boathouse and dock would encroach on their lot lines extending into the water. The city granted the Chatelains construction permit to build. The Owens and Terrys filed suit against the city and the Chatelains asserting several claims for actual and exemplary damages, injunctive, and declaratory relief. The city filed a plea to jurisdiction, asserting that they had governmental immunity from suit which was denied by the lower court. The city filed this interlocutory appeal.

A governmental entity waives immunity in a breach of contract claim when the entity is engaged in a proprietary function during the period the contract is entered into and not when the breach occurs. The court considered four factors when determining whether the city engaged in a proprietary or governmental function, whether: "(1) the City's act of entering into the leases was mandatory or discretionary, (2) the leases were intended to benefit the general public or the City's residents, (3) the City was acting on the State's behalf or its own behalf when it entered the leases, and (4) the City's act of entering into the leases was sufficiently related to a governmental function to render the act governmental even if it would otherwise have been proprietary." The city argued that this test should not apply to their actions, but the court held that the lessees' claims are based on the breach of the lease between the city and the tenants, so it is the correct test.

The court held that the contract between the city and the tenants was made in the city's proprietary function after weighing all four of the factors. The decision to lease the property was discretionary. The city entered into the lease to benefit its own residents rather than the general public. The city acted on its own behalf when making the decision to lease the property. Finally, leasing the land was not essential to the operation or maintenance of the lake. Based on all these factors, the city acted in a proprietary manner when it contracted with the lessees which waived its immunity.

Governmental Immunity-Contract: *Brown v. City of Ingram*, No. 04-19-00508-CV, 2019 WL 6138231 (Tex. App.—San Antonio Nov. 20, 2019) (mem. op.). This is an accelerated appeal by Brown that stems from the trial court's order granting the City of Ingram's plea to the jurisdiction and the court's judgment dismissing Brown's counterclaim.

The City of Ingram sued Brown and eight other defendants seeking declaratory relief that its ordinance related to the city's wastewater system was a valid and reasonable exercise of the city's police powers. Brown asserted a counterclaim against the city arguing that the city had breached its contract for wastewater services by knowingly permitting an unqualified, unlicensed subcontractor to connect her property to the city's sewer system and that the subcontractor's alleged negligence resulted in a severed gas line causing damage to Brown and her property. In response to her counterclaim, the city filed a plea to the jurisdiction, which was later amended, asserting governmental immunity from suit. The trial court granted the city's plea and dismissed Brown's counterclaim. Brown appealed.

The court of appeals concluded that the city's act of connecting residents to the city's sewer system and its decisions regarding whether and how to do so are governmental functions. Because the conduct underlying Brown's claim constitutes the city's performance of a governmental function, the court held that the city is immune from suit. The court also determined that even assuming that the city and Brown entered into a contract for wastewater services, such contract did not involve the provision of goods or services to the city. Because the contract is not a contract subject to Chapter 271 of the Local Government Code, entering into such contract did not waive the city's immunity from Brown's suit for breach of contract. Accordingly, the court affirmed the trial court's order.

Governmental Immunity-Contract: *Lower Valley Water Dist. v. Danny Sander Constr., Inc.*, No. 08-17-00261-CV, 2019 WL 3001523 (Tex. App.—El Paso July 10, 2019). The Lower Valley River District (district) solicited bids for contractors for the construction of water lines and other improvements for a construction project located in the Town of Clint and surrounding areas in 2014. Danny Sander Construction, Inc. (Sander) was the successful bidder on the project. The district and Sander entered into a written contract which required Sander to complete all work specified and indicated in the "Contract Document" by furnishing all labor, materials, transportation, and services for the construction of water lines and other improvements and related activities. The contract provided that it could be amended by change orders; the district could terminate the contract for convenience; and that Sander would be paid for work and expenses sustained prior to the termination.

Sander commenced work on the project in January 2016. There were two change orders presented to the district, which the district approved contingent upon release of funds by the Texas Water Development Board. The funds were released for Change Order 2, but not for Change Order 1. In February of 2017, the district sent an email to notify Sander that it was terminating the contract due to problems acquiring a right of entry to the site and problem encountered in a probate-court proceeding. Sander sent the district a summary of expenses incurred, but the district refused to pay the invoiced expenses. Sander filed suit asserting breach of contract for the unpaid expenses and a claim for withholding of retainage for the project. The district filed a plea to the jurisdiction asserting it had not waived governmental immunity for the expenses because they were based on Change Order 1, which was not incorporated into the contract. Sander responded to the plea stating that the expense did not include Change Order 1 only expense from the contract and Change Order 2. The trial court denied the district's plea.

The only issue argued by the district was that it did not waive its immunity regarding delays or expenses caused by denial of funding for Change Order 1 because the change order was never incorporated into the contract and therefore the trial court lacked subject matter jurisdiction. The court disagreed with the district. Conducting a *de novo* review, the court stated that governmental immunity has two components: immunity from liability and immunity from suit. In this case, immunity from suit is not waived just because a governmental entity enters into a contract. Section 271.152 of the Texas Local Government Code does waive qualifying local governmental entities' immunity from suit for certain breach of contract claims. To determine if immunity is waived under section 271.152, three elements must be established: (1) the party against whom

the waiver is asserted must be a "local government entity" as defined by Section 271.151(3); (2) the entity must be authorized by statute or the Constitution to enter into contracts; and (3) the entity must in fact have entered into a contract that is "subject to this subchapter" as defined by Sections 271.151 and 271.152.

The court determined that the district is a "local governmental entity" and that it is authorized to enter into contracts. The court analyzed if the district entered into a written contract stating the essential terms of the agreement for providing goods or services to the local government entity that is properly executed on behalf of the local governmental entity. The court determined that the district did since the district acknowledged that it did enter into a properly executed contract with Sander and the trial court had jurisdiction over claims arising out of that contract. However, the district's argument that Sanders' claims are based on Change Order 1 is an argument that the claim will fail on its merits. The court stated that such a claim does not deprive the trial court of subject matter jurisdiction.

Purchasing: *Tarrant Cty. v. Lerner*, No. 02-19-00330-CV, 2020 WL 98143 (Tex. App.—Fort Worth, Jan. 9, 2020) (mem. op.). This is a declaratory judgment/immunity case where the Fort Worth Court of Appeals held the county retained immunity for declaratory claims alleging violations of the competitive bidding statute.

The county had a contract with Dispute Resolution Services of North Texas (DRS) to manage the county's alternative dispute-resolution services and was valued at over $400,000 per year. When renewing the contract, Tarrant County did not seek competitive bids for the contract. A competitor, Lerner, sued asserting after the last renewal the contract was invalid due to the lack of bidding. The county filed a plea to the jurisdiction, which was denied.

The immunity waiver contained in the competitive bidding statute is specific and narrowly drawn: "Any property tax paying citizen of the county may enjoin performance under a contract made by a county in violation of [the Act]." TEX. LOC. GOV'T CODE § 262.033. The court held the Legislature intended to waive immunity for injunctive-relief claims arising from violations of the statute. However, that does not waive immunity for attorney's fees or any other form of relief. As a result, the court found the county retained immunity for Lerner's declaratory judgment claims. The plea should have been granted.

Governmental Immunity-Contract: *City of Helotes v. Page*, No. 04-19-00437-CV, 2019 WL 6887719 (Tex. App.—San Antonio Dec. 18, 2019) (mem. op.). This is an interlocutory appeal from the denial of the City of Helotes' plea to the jurisdiction in which the court of appeals held that the plaintiff's injuries occurred during the performance of a proprietary function.

A city employee dropped a table while removing it from a parked golf cart. The table allegedly struck the cart's accelerator causing the cart to propel forward and strike the plaintiff, Jean Marie Page. This accident occurred while the employee was setting up for an event referred to as the "MarketPlace at Old Town Helotes," which is a vendor fair sponsored, supervised, regulated, operated, and managed by the city. The MarketPlace is held on public streets which are closed to

traffic, and the city rents booths to vendors who sell crafts, merchandise, and food, and advertise and display the services they offer. The city also has a booth from which it sells beer. Page sued the city for negligence. The city filed a plea to the jurisdiction alleging the MarketPlace is a governmental function because it was an economic development tool to bring people into Old Town Helotes so as to improve the existing businesses' finances and generate community involvement. The trial court denied the plea.

The court applied the following four prong test delineated in *Wasson Interests, Ltd. v. City of Jacksonville* to determine whether the MarketPlace was a proprietary or governmental activity: (1) whether the city's act was mandatory or discretionary; (2) whether the activity was intended to benefit the general public or the city's residents; (3) whether the city was acting on the state's behalf or on its own behalf in performing the activity; and (4) whether the city's act was sufficiently related to a governmental function to render the act governmental even if it would otherwise have been proprietary.

The city conceded that its decision to own, support, and operate the MarketPlace was discretionary indicating that the MarketPlace was likely proprietary. The court also determined that although non-residents participated in and benefited from the MarketPlace, its primary objective was to assist local businesses by generating community involvement in the Old Town Helotes area which raised funds for the city's general budget. Additionally, the court found that the city administrator's testimony regarding the collection of sales taxes, the recording of revenues in the MarketPlace's budget, and the use of the profits for the MarketPlace or other city departments provided some evidence that the city was acting on its own behalf. Finally, the court concluded that there was no evidence that the operation of the MarketPlace is "essential" to the city's governmental actions. Accordingly, the court affirmed the trial court's order.

Governmental Immunity-Contract: *Dallas Area Rapid Transit Auth. v. GLF Construction Co.*, No. 05-19-00930-CV, 2020 WL 1650060 (Tex. App.—Dallas Apr. 3, 2020) (mem. op.). This is an interlocutory appeal in a contractual immunity case in which the court of appeals affirmed the trial court's order denying the Dallas Area Rapid Transit Authority's (DART's) plea to the jurisdiction.

GLF Construction Company (GLF) and DART entered into a contract for GLF to build part of a DART light rail extension. In the contract, the parties agreed to an administrative dispute resolution process. According to GLF, DART's inadequate project administration drove GLF's costs up far beyond the contract price. GLF submitted a request for equitable adjustment, which was denied by a DART contracting officer. GLF administratively appealed the contracting officer's decision to an administrative judge, but the judge's decision, while finding liability and damages, did not provide which party owed any money. In January 2019, GLF sued DART for breach of contract and for a finding to hold the dispute resolution process unconstitutional. DART filed a plea to the jurisdiction, which was denied. DART appealed.

DART asserts that its immunity was not waived because: (1) the contract in question was executed in 1999 before Chapter 271 of the Local Government was in effect; and (2) GLF failed to exhaust its remedies under the dispute resolution process. The court declined to decide

whether Chapter 271 applies retroactively but found that DART did not establish that GLF failed to exhaust the contract's adjudication process. The court of appeals found DART's position – that GLF's failure to formally list its suit as an appeal or identify any legal errors in the administrative judge's ruling that the lawsuit was not an appeal of that decision – lacking. The court noted that GLF requested a trial de novo from the administrative law judge's decision and sought damages. As a result, GLF's petition challenges the administrative judge's decision within the plain meaning of the regulations and contract, and the plea was properly denied.

Governmental Immunity-Contract: *Amador v. City of Irving*, No. 05-19-00278-CV, 2020 WL 1316921 (Tex. App.—Dallas Mar. 20, 2020) (mem. op.). This is an appeal involving a breach of contract claim in which the court of appeals reversed the trial court's order granting the City of Irving's plea to the jurisdiction.

Amador enrolled in a program offered by the city, and funded by HUD, to provide low-income homeowners loans to refurbish their homes using city-approved contractors under the city's supervision. Under the program, a homeowner is required to sign a loan document in which a portion of the loan is non-deferred and interest bearing, while the remainder is deferred at a rate of 1/15th per year, but is due in full should the homeowner move out of the home or choose to sell it. The program uses a list of preferred contractors who have been vetted by the city and have agreed to the city's terms, practices, and construction standards. All preferred contractors are invited to bid on a project, and upon receipt and review of the bids, the city presents all eligible bids to the homeowner who may then choose a contractor from any of the eligible bids. Upon enrollment, Amador signed a copy of the city's policies and procedures and loan documents. She also entered into a mechanic's lien contract with Javier Villagomez, a city-approved contractor that she selected to restore her home. Villagomez immediately transferred the lien to the city. Amador was not satisfied with the contractor's work, claiming that he performed substandard work that resulted in damage to her home. Amador alleges that the city was aware that the contractor was not competent, licensed, bonded or insured, and that when she informed the city of the problems with his work, the city repeatedly told her that the work would be completed, yet the city paid the contractor in full and did nothing to help fix her home. Amador sued the city and the contractor asserting against both defendants claims for breach of contract and negligence, and against the city claims for fraudulent inducement and violations of the Deceptive Trade Practices Act. She sought a declaratory judgement that the subject agreements be declared void or voidable at her election, and to recover attorney's fees. The city filed a plea to the jurisdiction asserting governmental immunity. Following a hearing, the court granted the plea and dismissed the city from the suit. Thereafter, Amador settled her claims with the contractor. Amador appealed the plea as it relates to the city.

The court first looked at whether the contract was an agreement for providing goods or services to the city such that governmental immunity was waived under Chapter 271 of the Local Government Code. The court concluded that Villagomez's service of repairing Amador's home was a service to the city by virtue of the city's property interest in the home, which was acquired by lien assignment, and that Amador's payment of interest to the city under the loan agreement provided the city with a direct benefit. The court then looked at whether waiver of immunity

from suit extends to claims for damages where there is no "balance due and owed." The court concluded that Amador had alleged damages recoverable under Chapter 271 as the damages to remedy the improper work done by Villagomez directly and necessarily resulted from the city's breach of the contract. As such, the court reversed the trial court's grant of the city's plea to the jurisdiction on the breach of contract claims. However, the court affirmed the trial court's order granting the city's plea with respect to the non-contract claims, finding that Chapter 271 does not waive immunity for negligent or intentional torts. Finally, the court affirmed the trial court's order granting the city's plea to the jurisdiction regarding the Uniform Declaratory Judgment Act (UDJA), finding that Amador did not allege a UDJA claim for which governmental immunity was waived.

Governmental Immunity-Contract: *City of Elsa v. Diaz*, No. 13-19-00109-CV, 2020 WL 1615659 (Tex. App—Corpus Christi–Edinburg Apr. 2, 2020) (mem. op.). This is an interlocutory appeal (second for the case) in a contractual immunity case where the Thirteenth Court of Appeals held the city's summary judgment was merely a motion to reconsider the already denied plea to the jurisdiction, so the appellate court lacked interlocutory jurisdiction.

Diaz was appointed as interim police chief, but emails stated if not selected for the permanent position, he would resume his role as the warrants officer. Later, a new city manager removed Diaz from the chief position but terminated his employment. Diaz sued for breach of contract. The city first filed a plea to the jurisdiction which was granted. However, the Thirteenth Court of Appeals reversed and remanded. On remand, the city filed separate no-evidence and traditional motions for summary judgment, each reasserting that the trial court lacks subject matter jurisdiction because the city council did not formally approve the contract. The motions were denied, and the city took this interlocutory appeal.

Although Section 54.014(a) does not expressly limit a party to one interlocutory appeal, the right to successive interlocutory appeals is not without limits. When a second motion/plea constitutes nothing more than a motion to reconsider, without any new or distinct evidence or arguments, the appellate court lacks interlocutory jurisdiction. In making this determination, courts of appeals should compare both the substance and procedural nature of the two challenges. The court held, in this case, the original plea and the motions for summary judgment were substantively and procedurally identical. The only change is the city added an affidavit which implicitly refutes evidence considered in Diaz I regarding the authority to enter into the contract by the city manager. Since the second set of motions does not contain "new and distinct" challenges to the trial court's jurisdiction, they are mere reconsiderations. The court of appeals, therefore, dismissed the appeal for lack of interlocutory jurisdiction.

Governmental Immunity-Contract: *Harlandale Indep. Sch. Dist. v. Jasmine Engineering, Inc.*, No. 04-19-00638-CV, 2020 WL 1159056 (Tex. App.—San Antonio March 11, 2020) (mem. op.). This is an appeal of the denial of a plea to the jurisdiction in a case involving a breach of contract in which the court of appeals affirms the trial court's order.

In 2012, Harlandale Independent School District (district) and Jasmine Engineering, Inc. (Jasmine) entered into a professional services agreement (PSA), which was subsequently

amended six times. In January 2018, the district informed Jasmine that the PSA was terminated without cause. Jasmine then sued the district for breach of contract, alleging that the PSA required a finding of cause to terminate. The district filed a plea to the jurisdiction and attached a final investigative report by the Texas Education Agency (TEA), which made findings and conclusions that the district and its representatives violated state law when the district entered into and later amended the PSA. The district argued that Jasmine could not demonstrate a valid waiver of the district's governmental immunity because, according to the TEA, the PSA was unauthorized by law and improperly executed, and a contract made in violation of the law does not waive governmental immunity. The trial court denied the plea and the district appealed.

The court of appeals upheld the trial court's judgement finding that while the TEA has statutory authority to initiate investigations into contracting matters, make findings, and impose sanctions pursuant to its findings, it's findings do not bind a court or the parties in a contract dispute, so as to deprive a trial court of jurisdiction. Because the district did not ask the trial court to determine whether the PSA was entered or amended in violation of state law, the district did not meet its burden to establish the trial court lacked subject matter jurisdiction.

Governmental Immunity-Contract: *Elizabeth Benavides Elite Aviation, Inc. v. City of Laredo,* No. 05-18-01527-CV, 2020 WL 2044678 (Tex. App.—San Antonio Apr. 20, 2020) (mem. op.). This is a case involving a breach of contract claim where the court of appeals found that the City of Laredo engaged in a governmental activity when it entered into a lease agreement with Elizabeth Benavides Elite Aviation, Inc. (Elite).

In 2006, Elite entered into a lease agreement with the city for the use of a tract of land at the Laredo International Airport solely for the purpose of storage and dispensing of aviation fuels for fueling aircraft. Elite was also required to construct a concrete fuel containment pad for the installation of aboveground fuel storage tanks. In 2019, Elite filed a breach of contract claim against the city. Elite's pleading alleged that the city was acting in a proprietary capacity when it entered into the lease with Elite, thereby waiving its immunity. In its plea, the city argued it was protected by governmental immunity. The trial court granted the city's plea and dismissed Elite's claim against the city. Elite appealed.

The court of appeals began its analysis with a discussion of the law surrounding the governmental/proprietary dichotomy under the Texas Tort Claims Act (TTCA), which expressly categorizes certain municipal activity as governmental or proprietary. Where it does not, the Supreme Court of Texas has articulated four factors to consider in determining whether an act is proprietary or governmental: (1) whether the city's act is mandatory or discretionary; (2) whether the act is intended to benefit the general public or the city's residents; (3) whether the city is acting on the state's behalf or its own behalf in undertaking the activity; and (4) whether the city's act is so related to a governmental function to render the act governmental even if it would otherwise be proprietary.

Although Elite's brief focused on the above four factors in arguing that entering into the contract was a proprietary activity, the court of appeals noted that it did not need to resort to those factors because the TTCA expressly lists "airports" as a governmental function in Section

101.0215(a)(10) of the TTCA. Further, the Supreme Court of Texas has explained that when determining whether governmental immunity applies to a breach-of-contract claim against a municipality, the nature of the contract governs the activity. Because the nature of the contract involved airports, a subject specifically defined as governmental, the court found that the activity was governmental. As such, the court concluded that the city engaged in a governmental activity when it entered into lease with Elite. Accordingly, the court held that the city was immune from suit and affirmed the trial court's order dismissing Elite's claim.

GOVERNMENTAL IMMUNITY-TORT

Governmental Immunity-Tort: ***University of Tex. v. Garner,*** **No. 18-0740, 2019 WL 5275579 (Tex. Oct. 18, 2019)**. This is a Recreational Use Statute case where the Supreme Court of Texas reversed the denial of the university's plea to the jurisdiction and dismissed the claims.

The University of Texas at Austin owns and operates the Colorado Apartments, a student housing complex. Within the complex are four roads that permit two-way traffic around the complex and contain parking spaces that are perpendicular to the road. They connect to City of Austin streets. Bicyclists commonly use the road. Garner was traveling by bicycle to the trail head at Eilers Park. A university employee, Angel Moreno, was backing out from a southwest-facing parking space and struck Garner. Garner sued the university for negligence, contending that the Tort Claims Act waived the university's immunity by the operation and use of a motor vehicle. The university filed a plea to the jurisdiction asserting the application of the Recreational Use Statute (RUS), which was denied, and the court of appeals affirmed. The university appealed.

The RUS limits the liability of all landowners — public and private — who permit others to use their property for activities the statute defines as "recreation." Such landowners are "effectively immunize[d]" from ordinary negligence claims, owing those who use their property for recreation only the duty not to injure them intentionally or through gross negligence. Garner's only claim against the university sounds in ordinary negligence. She does not allege that the university or Moreno acted with gross negligence, malicious intent, or bad faith. The court of appeals held the RUS did not apply because under subsection (c) it did not grant permission to use the roads for recreational use. However, the RUS subsection (f) states "Notwithstanding Subsections (b) and (c), if a person enters premises owned, operated, or maintained by a governmental unit and engages in recreation on those premises, the governmental unit does not owe to the person a greater degree of care than is owed to a trespasser on the premises." Subsection (f) contains no language (unlike subsection (c)) requiring permission or invitation. Here, it is undisputed that Garner: (1) entered premises owned by a governmental unit; and (2) engaged in an activity on those premises (bicycling) that qualifies as "recreation" under the statute. As a result, no waiver of immunity applies.

Governmental Immunity-Tort: ***Reyes v. Jefferson Cty.*****, No. 18-1221, 2020 WL 1898542 (Tex. Apr. 17, 2020).** This is a case about notice under the Texas Tort Claims Act (TTCA).

Reyes sued Jefferson County under the TTCA for injuries he allegedly sustained in an automobile accident with a county law enforcement officer. Within six weeks of the accident,

Reyes's attorney contacted the county to file a claim. The county instructed Reyes's attorney to direct all claims to the county's authorized third-party administrator. Reyes's letter to the third-party administrator: (1) notified the county of Reyes's negligence claim; (2) identified the date of the accident, described it as a "crash," and named the county employee involved; (3) requested the crash reports and copies of statements Reyes had made; and (4) expressed interest in "a quick and amicable resolution of this claim."

The appellate court held Reyes did not comply with the formal-notice requirement in Section 101.101(a) of the Civil Practice and Remedies Code because his letter to the third-party administrator "failed to provide a place of the incident and failed to 'reasonably describe' the incident." The appellate court also concluded the county lacked actual notice within the meaning of Section 101.101(c) because the county's investigation failed to uncover any negligent conduct, so it had no knowledge "that it might have been at fault."

Section 101.101 requires "notice of a claim" to include specific information, unless the governmental unit has "actual notice that death has occurred, that the claimant has received some injury, or that the claimant's property has been damaged."

The court declined to consider if Reyes's letter to the third-party administrator was sufficient to constitute formal notice because the actual-notice exception was satisfied as a matter of law. Actual notice exists only when the governmental unit has knowledge of: (1) a death, injury, or property damage; (2) the governmental unit's alleged fault producing or contributing to the death, injury, or property damage; and (3) the identity of the parties involved. Actual notice means the governmental unit is subjectively aware that it may be responsible for death, injury, or property damage in the manner ultimately alleged by the claimant.

In this case, the county and its authorized claims administrator knew about Reyes's allegations that a specifically identified county employee had injured him in an automobile accident. Reyes's communications with the third-party administrator coupled with its acknowledgment, investigation, and denial of his claim establish the county's subjective awareness that Reyes was claiming the county was at fault in the manner ultimately alleged in this lawsuit. The actual-notice standard does not require proof that the county believed it was liable. Because of that, the Supreme Court of Texas reversed the appellate court's ruling.

Governmental Immunity-Tort: *Texas Dep't of Criminal Justice v. Rangel*, No. 18-0721, 2020 WL 596876 (Tex. Feb. 7, 2020). This is a Texas Tort Claims Act (TTCA) case where the Supreme Court of Texas held the Texas Department of Criminal Justice (TDCJ) retained immunity for hitting an inmate with a tear-gas shell because the riot exception to the TTCA applied.

Two groups of inmates were threatening each other in the Pam Lychner State Jail. The groups totaled twenty-six inmates. After giving orders to cease hostilities for almost an hour, which the inmates ignored, a TDCJ warden authorized a lieutenant to use a rifle as a show of force. The armory employee gave the lieutenant the rifle and two shells, including a skat shell. A "skat shell" launches five pyrotechnic submunitions that are designed to deliver chemical agents at a range of up to eighty meters. The lieutenant accidentally loaded the skat shell. After giving a

final order to rack up, which the inmates refused, the lieutenant fired the skat shell at the group of inmates who refused to comply with orders. The skat shell hit Rangel, injuring him. Rangel sued. TDCJ conducted an internal use-of-force review that "revealed several mistakes" as to how the incident was handled, noting that the skat shell was "designed for outdoor areas" only and "that chemical agents should have been administered through the door rather than in the middle of the housing area." The lieutenant who fired the skat shell was disciplined. TDCJ filed a plea to the jurisdiction, which was denied.

The Supreme Court of Texas held the supervisor's order to use the tear-gas gun was a "use of tangible personal property" under the TTCA. It was not the use by the individual guard following orders but was a "use" by the supervisor who authorized an order the gun be put into play. The distinguishing factor is the order by the supervisor specifically to use the weapon, and not merely making the weapon available to the guard with no direction. [Comment: the court spent multiple pages in the opinion on this distinction.] The court did not address TDCJ's argument regarding the intentional tort exception to the TTCA. However, the immunity waiver does not apply to a claim "based on an injury or death connected with any act or omission arising out of civil disobedience, riot, insurrection, or rebellion." TEX. CIV. PRAC. & REM. CODE § 101.057(1). Rangel argued that the circumstances did not constitute a riot or there was a fact issue as to whether a riot existed. The court concluded the plain and ordinary meaning of the term "riot" also includes how the term is used in other statutes, including the Penal Code. The Penal Code defines "riot" in part as "the assemblage of seven or more persons resulting in conduct" that "creates an immediate danger of damage to property or injury to persons." TEX. PENAL CODE § 42.02(a). While not identical, that definition is in line with the ordinary meaning of "riot," emphasizing not only the size of assemblage and nature of the events but also the immediate danger. As a result, the undisputed facts of the case constitute a riot as a matter of law. As a result, no waiver of immunity exists, and the plea should have been granted. The court reversed the First Court of Appeals and rendered judgment in favor of TDCJ.

Governmental Immunity-Tort: *City of Dallas v. Rodriguez*, No. 05-19-00045-CV, 2020 WL 1486831 (Tex. App.—Dallas Mar. 27, 2020) (mem. op.). On the court's own motion, the court withdrew its opinion and judgement from August 7, 2019, and substitutes this new opinion and corresponding judgement in its place. In the new opinion, the court reverses the trial court's order, grants the city's plea to the jurisdiction, dismisses Rodriguez's claims for want of subject matter jurisdiction, and remands the case to the trial court for further proceedings consistent with this opinion.

This is an appeal of a trial court's order denying the City of Dallas' plea to the jurisdiction in a case involving an accident with a marked police vehicle in which the court reverses the trial court's order, dismisses Rodriguez's claims, and remands the case to the trial court.

Rodriguez alleged that she was injured after a City of Dallas police officer disregarded a red light and caused her vehicle to strike the officer's marked vehicle. Rodriguez sued the city alleging negligence, gross negligence, respondeat superior, and negligence per se. The city filed a plea to the jurisdiction arguing that the police officer was entitled to official immunity and the city was shielded from liability by governmental immunity because the officer was performing a

discretionary function within the scope of her employment and acting in good faith. The city's plea was supported by the officer's affidavit describing the circumstances of the accident and her actions and perceptions of the urgency of the situation and risks involved. Rodriguez objected to the police officer's affidavit arguing that it was hearsay and that five paragraphs of the affidavit should be excluded. The trial court denied the city's plea and sustained Rodriguez's objections to the affidavit except for one statement. The city appealed.

The court of appeals first looked at whether the trial court abused its discretion in sustaining Rodriguez's objections to the affidavit offered in support of the city's plea to the jurisdiction. The court concluded that Rodriguez's objections were not sufficiently stated as she did not state the specific grounds on which each identified section of the affidavit was objectionable.

The court next addressed whether the officer in the performance of discretionary duties acted in good faith so as to sustain the defense of official immunity. The court concluded that Rodriguez failed to raise a factual dispute as to whether the officer acted recklessly or in violation of the law. The court also determined that the following evidence conclusively established that the officer was acting in good faith: (1) the officer was responding to a potentially life threatening emergency involving several unknown people beating on a woman's door and threatening her with a gun; (2) the officer stopped at the intersection and believed, in good faith, that the need to get to the scene of the emergency call outweighed the perceived minimal risk of an accident; (3) the road was dry, traffic appeared to be yielding to the officer, and her emergency lights, siren, and air horn were activated; and (4) she did not perceive that proceeding through the intersection would cause any danger to any other driver near her location. Accordingly, the court reversed the trial court's order, granted the city's plea to the jurisdiction, dismissed Rodriguez's claims for want of subject matter jurisdiction, and remanded the case to the trial court for further proceedings consistent with this opinion.

Official Immunity: ***City of Dallas v. Rodriguez*****, No. 05-19-00045-CV, 2019 WL 3729504 (Tex. App.—Dallas Aug. 7, 2019)**. This case arises from an appeal of a trial court's order denying the City of Dallas' plea to the jurisdiction in a case involving an accident with a marked police vehicle.

Rodriguez alleged that she was injured after a Dallas police officer disregarded a red light and caused her vehicle to strike the officer's marked vehicle. Rodriguez sued the City of Dallas alleging negligence, gross negligence, respondeat superior, and negligence per se. The city filed a plea to the jurisdiction arguing that the police officer was entitled to official immunity and the city was shielded from liability by governmental immunity because the officer was performing a discretionary function within the scope of her employment and acting in good faith. The city's plea was supported by the officer's affidavit describing the circumstances of the accident and her actions and perceptions of the urgency of the situation and risks involved. Rodriguez objected to the police officer's affidavit arguing that it was hearsay and that five paragraphs of the affidavit should be excluded. The trial court denied the city's plea and sustained Rodriguez' objections to the affidavit except for one statement. The city appealed.

The court of appeals first looked at the sufficiency of the affidavit. The court concluded that Rodriguez did not state the specific grounds on which each identified section of the affidavit was objectionable, and as such the objections were not sufficiently specific. The court next addressed whether the officer in the performance of discretionary duties acted in good faith so as to sustain the defense of official immunity. The court determined that the following evidence conclusively established that the officer was acting in good faith: (1) the officer was responding to a potentially life threatening emergency involving several unknown people beating on a woman's door and threatening her with a gun; (2) the officer stopped at the intersection and believed, in good faith, that the need to get to the scene of the emergency call outweighed the perceived minimal risk of an accident; (3) the road was dry, traffic appeared to be yielding to the officer, and her emergency lights, siren, and air horn were activated; and (4) she did not perceive that proceeding through the intersection would cause any danger to any other driver near her location. Accordingly, the court concluded that the trial court erred in denying the city's plea to the jurisdiction.

Governmental Immunity-Tort: *Loy v. City of Alice*, No. 04-18-00969-CV, 2019 WL 3642656 (Tex. App. – San Antonio Aug. 7, 2019) (mem. op.). This case stems from an appeal of a trial court order granting the City of Alice's plea to the jurisdiction in a personal injury case.

Loy alleged that while she was jogging at a city park, her foot was caught on a severed metal post that was sticking up approximately two inches from the ground and that she fell to the ground and shattered her left elbow. Loy sued the city asserting that because the metal post was camouflaged by leaves, dirt, and grass, the city had created a dangerous condition and was grossly negligent by failing to remove the metal post despite actual knowledge of the dangerous condition. The city filed a plea to the jurisdiction asserting that it did not have actual knowledge or awareness of the severed post, and produced affidavits, testimony, and photo evidence to support its claims. The trial court granted the city's plea. Loy appealed.

The court of appeals applied a burden-shifting analysis to determine whether, pursuant to the recreational use statute, the city conclusively established it lacked subjective awareness, or actual knowledge, of the dangerous condition. The court found that Loy's allegation that the city created the dangerous condition permits an inference that the city had actual knowledge of the dangerous condition. The court then found that once the burden shifted to the city to produce evidence conclusively establishing it did not create the condition, the city failed to conclusively negate Loy's allegation because none of the affidavits produced by the city positively and directly asserted that the city did not create the dangerous condition. The court also considered the alternative – if the evidence the city produced affirmatively negated that it did not create the dangerous condition would the city meet its burden. If that was the case, the burden would have shifted back to Loy to produce evidence raising a fact issue. The court found that Loy had met this burden by producing deposition testimony from city staff who testified that the responsibility falls on park employees to alter or modify the metal posts located in the parks, and it was reasonable to conclude that removal of the posts was done by the city. As such, the court concluded that the city failed to satisfy its burden to conclusively negate its actual knowledge of

the alleged dangerous condition and, alternatively, that Loy raised a fact issue as to actual knowledge, the only issue the city raised in its plea.

Accordingly, the court reversed the trial court's order of dismissal and remanded the case.

Governmental Immunity-Torts: ***CJK Trucking, L.P. v. City of Honey Grove*****, No. 05-18-00205, 2019 WL 3296978 (Tex. App.—Dallas July 23, 2019)**. This case stems from an appeal of the trial court's order granting the City of Honey Grove's plea to the jurisdiction in a case involving an automobile accident.

Williamson, an off-duty police officer for the city, was traveling north on a highway when he observed a City of Trenton police car with its lights activated parked behind a private vehicle and an unmarked SUV blocking the police car in. Williamson thought the scene was not secure and atypical because he could not see the officer, and the patrol vehicle was blocked in at a liquor store attached to a gun shop after hours, raising concerns that the officer might be ambushed, in distress, in need of assistance or be in physical danger. Williamson engaged his emergency lights and attempted to make a U-turn to go south. Ketan and Manali Amine, who were travelling southbound on the highway, were able to stop and avoid colliding with Williamson; however, they were rear-ended by a tractor trailer that could not stop on time. The tractor trailer was owned or leased by CKJ Trucking and driven by Bond. The Amines filed suit against Bond and CKJ Trucking alleging various claims for negligence. Bond and CKJ Trucking then filed a third party petition against Williamson and the city alleging that the city's governmental immunity was waived because the accident and the Amines' injuries were proximately caused by the wrongful act or omission or negligence of an employee acting within the scope of his employment and the accident arose from the operation or use of a motor-driven vehicle or motor-driven equipment. The city filed a motion to dismiss and a motion to sever asserting that the case did not fall within the limited waiver of immunity under Section 101.021 of the Tort Claims Act and that the trial court lacked jurisdiction because Williamson was not acting within the scope of his employment at the time of the accident. The trial court granted the city's motion to dismiss with prejudice. Bond and CKJ Trucking appealed.

The court of appeals looked at whether Williamson was acting within the scope of his employment at the time of the accident. Police officers have a duty to prevent crime and arrest offenders 24 hours a day, and that public duty is triggered any time an officer observes a crime outside the hours of his official work. As a result, the court concluded that Williamson acted within the scope of his employment with the city as his authority to act as a peace officer was triggered by reasonable suspicion. Accordingly, the city's immunity was waived. The court reversed the trial court's order and remanded the case for further proceedings.

Governmental Immunity-Torts: ***Houghton v. City of Cisco*****, No. 11-18-00029-CV, 2019 WL 3023539 (Tex. App.—Eastland July 11, 2019) (mem. op.)**. In this interlocutory appeal, the Eleventh District Court of Appeals held that the City of Cisco waived its government immunity on an inverse-condemnation claim, but not under the Texas Tort Claims Act (TTCA).

Lloyd Houghton, Vicki Johnson, and Mark A. Smith all leased property from the city located along the shore of Lake Cisco. Lake Cisco and the attached dam that controls the water level of

the lake are also owned by the city. In 2016, the lessees' properties were flooded which resulted in damages to the properties. The lessees alleged that the city's decision to continue to pump water into the lake and not open the sluice gates to the dam, even though the water had risen to higher levels due to rain, caused the flooding. The lessees sued the city under theories of inverse condemnation and negligence under the TTCA. The city filed a plea to jurisdiction on all claims which was granted at the lower court. The lessees appealed that decision.

In reviewing a plea to jurisdiction, a court must look at the plaintiff's jurisdictional evidence contained in their pleadings, construe them in a light most favorable to the plaintiff, and determine if jurisdiction is affirmatively demonstrated. The Eastland Court of Appeals held the lower court did have jurisdiction over the inverse condemnation claims and immunity had been waived because, taking the lessees' allegations as true, their pleadings sufficiently alleged each element of an inverse condemnation claim. However, the court held that immunity was not waived on the TTCA claim because the city's actions fell within the discretionary acts exception to the waiver of government immunity for property damage. Specifically, the court had held in past cases that a governmental entity's decision to release or not release water was a discretionary action.

Governmental Immunity: ***Stegall v. TML Multistate Intergovernmental Emp. Benefits Pool, Inc.*****, No. 05-18-00239-CV, 2019 WL 4855226 (Tex. App.—Austin Oct. 2, 2019) (mem. op.)**. This is an appeal challenging the trial court's order finding that the TML Multistate Intergovernmental Employee Benefits Pool, Inc. (TML) and UMR, Inc., one of TML's third-party health benefits administrators, have governmental immunity in a health benefits coverage dispute.

Joe Stegall was the chief financial officer for the City of Royse and was a participant in the city's health benefits program provided by TML, an intergovernmental self-insurance risk pool. Stegall was diagnosed with bile cancer and liver cancer, and following an initial round of chemotherapy, his oncologist prescribed Nexavar, an FDA-approved drug designed to increase survival rates and life expectancy for patients with advanced liver cancer. TML and UMR initially denied coverage for the drug, but eventually reversed course and agreed to provide coverage for Nexavar. Stegall died several weeks later. Stegall's spouse sued TML and UMR for wrongful denial of medical benefits and additional acts of interference with the decedent's access to prescribed chemotherapy under tort and contract theories. TML and UMR filed general denials, and with respect to the tort claims, both filed pleas to the jurisdiction on the grounds of governmental immunity. The trial court, after separate hearings, granted both pleas to the jurisdiction leaving only Stegall's breach of contract claim against TML. Stegall voluntarily nonsuited her breach of contract claim and filed a motion for new trial. Her motion for a new trial was overruled by operation of law, and she appealed asserting that TML did not have governmental immunity because it was engaged in proprietary functions.

The court concluded that TML's "nature, purposes, and powers" demonstrate legislative intent that TML is a distinct governmental entity entitled to assert immunity in its own right, and that the Legislature intended for self-insurance pools to perform governmental functions and services. As a result, the court declined to extend the governmental/proprietary distinction to

TML concluding that immunity had not been waived. The court also concluded that UMR, as TML's third-party administrator, has the same governmental immunity as TML. Accordingly, the court affirmed the trial court's order granting the pleas to the jurisdiction.

Governmental Immunity-Torts: *City of Richardson v. Phelps*, No. 05-18-00753-CV, 2019 WL 2912238 (Tex. App.—Dallas July 8, 2019) (mem. op.). This is an interlocutory appeal in which the court of appeals reversed the trial court's order denying the City of Richardson's plea to the jurisdiction in a personal injury case.

Van Phelps sued the city after he sustained an injury while riding his bicycle in a designated bike lane. Phelps alleged that the left side of the bike lane was higher than the right side, resulting in a "lip" that was a hazardous condition, and that this condition was either a premises defect or a special defect. The city filed a plea to the jurisdiction, asserting governmental immunity barred Phelps's claims because the alleged defect was not a special defect and the city did not have actual knowledge of the condition, which is required for a premises defect. The trial court denied the plea, and the city filed an interlocutory appeal.

The court of appeals concluded that the difference in elevation in the bike lane was not a special defect as a matter of law because there was no evidence that the "lip" presented a condition like an excavation or obstruction for cyclists. Phelps testified that the other cyclists with him avoided the defect and that, if he had known about the condition, he could easily have avoided it. As such, the court determined that if the condition could be easily avoided, it was not in the nature of an excavation or obstruction on the roadway.

Additionally, the court of appeals determined that the condition of the bike lane was not a premise defect because Phelps did not raise a fact issue on the city's actual knowledge of the dangerous condition. The evidence presented showed that the city was informed about one defect, which was repaired before Phelps's accident, and the city did not have actual knowledge of the height difference even though the defect was a few yards away from where it had made other repairs. Accordingly, the city was immune from Phelps's premises liability claim.

Governmental Immunity-Tort: *City of Houston v. Garza*, No. 01-18-01069-CV, 2019 WL 2932851 (Tex. App.—Houston [1st Dist.] July 9, 2019) (mem. op.). This is a Texas Tort Claims Act case where the First Court of Appeals affirmed the denial of the city's summary judgment because the city failed to establish that it was not responsible for the car that got into an accident with the plaintiff in the car.

Garza was arrested by the city's police department. While she was being transported from the city's jail to the county jail, the transport car got into an accident and Garza was injured. Garza did not know if it was the city's car or the county's car, so she sued both.

The city filed its plea to the jurisdiction with affidavits from the arresting officer and the officer on duty for transport on the date of the accident and arrest. The arresting officer's affidavit stated he arrested Garza at about 5:14 a.m. and took Garza to the city's jail. The transport officer's affidavit stated his shift began at 2:00 p.m. and he did not get into an accident on the date and did not observe an inmate displaying any of the things Garza had claimed. The county filed an

affidavit stating: (1) it has never been the practice of the county to transport inmates from the city's jail where Garza was housed; and (2) there were only 2 fleet vehicle accidents on the date of the accident, and neither were driven by an officer assigned to inmate transport.

The court of appeals held that the denial of summary judgment was proper because the city had a gap in the timeline from 5:14 a.m. to 2:00 p.m. where Garza could have been transported by the city. The city did "not conclusively establish that no City employee was operating the motor vehicle that Garza alleged was involved in the collision that caused her injuries."

Governmental Immunity-Tort: *Doe v. City of Dallas*, No. 05-18-00771-CV, 2019 WL 2559755 (Tex. App.—Dallas June 21, 2019) (mem op.). In this case, the Dallas Court of Appeals affirms the trial court's order dismissing claims against the City of Dallas.

Jane Doe, individually and as next friend of S.D. (Doe's minor child), sued the City of Dallas after S.D. was sexually assaulted while performing community service at the Umphress Recreation Center, which the city owns and operates. Doe sued the city for premises liability and personal injury proximately caused by a condition or use of tangible personal or real property. Doe alleged the layout of the recreation center was defective; the security camera system was not installed properly; that management knew about these design defects and broken surveillance system; and that these defects led to the sexual assault. The city filed a plea to the jurisdiction arguing that the city did not receive timely written or actual notice of Doe's claims as required by the Texas Tort Claims Act (TTCA). The trial granted the plea and dismissed the claims against the city. Doe appealed.

On appeal, Doe argues the city had subjective awareness that it was at fault because of the following facts: the city knew S.D. was instructed to clean the men's restroom without supervision and knew the men's restroom was hidden from view because of the facility's layout; the city knew it was not unusual for only one person to be in the weight room; the city's employees agreed S.D. did not cause the sexual assault; the city failed to follow its volunteer program policies and procedures with S.D., including failure to timely complete S.D.'s application to the volunteer program, obtain a signed acknowledgement from S.D. to confirm she received a copy of the volunteer program policies, and train S.D.; the city was aware the risk of leaving children alone with adults included potential sexual assault; the city lacked training, policies, or procedures for its staff and employees to protect minor children from sexual assaults; the city had a security surveillance system installed in the building to protect people, and the city knew the system was not working on the day of the incident; the city did not train employees at Umphress to use the camera surveillance system, instruct staff to monitor the surveillance system, and place a display monitor in an area accessible to multiple employees; and the city did not prohibit sex offenders or other violent criminals from using its recreation centers and did not perform background checks for those individuals.

The court concludes that whether the cumulative evidence implies the city was responsible for the injury is not the proper inquiry; the standard for actual notice is "That a governmental unity has subjective awareness that its fault, as ultimately alleged by the claimant, produced or contributed to the claimed injuries." Doe testified that she did not inform the city or city staff that

the city was responsible for what occurred. Doe's interaction with the city was limited to identifying the perpetrator. The court holds that the evidence does not show the city had subject awareness that its fault, if any, produced or contributed to the injury. The trial court's order is affirmed.

Governmental Immunity-Tort: *Grand Prairie Indep. Sch. Dist. v. Castro*, No. 05-18-01415-CV, 2019 WL 2521724 (Tex. App.—Dallas June 19, 2019) (mem. op.). This is an appeal in which the court of appeals affirmed the trial court's denial of Grand Prairie Independent School District's (GPISD) plea to the jurisdiction and remanded the case to the trial court for further proceedings.

JIC, a school child, was on a bus operated by GPISD waiting to be transported from his middle school to another destination. At some point after the bus driver started the bus to begin the trip, but while the bus remained stationary, JIC reached beneath his seat to place his backpack out of the way. When he did, three fingers on one of his hands were lacerated by the turning blades of an unscreened fan that became operational when the bus was started by its driver. GPISD personnel knew of the exposed fan blades before the bus was started. JIC's next friend, Castro, sued the school district for negligence. The district filed its plea to the jurisdiction claiming immunity because the injuries did not arise from the "operation or use" of the school bus, a motor-driven vehicle, within the meaning of the Texas Tort Claims Act (TTCA). The district court denied the plea, and GPISD filed an interlocutory appeal.

The court of appeals determined that JIC's injuries arose from the operation or use of the school bus. The court looked to the ordinary meaning of the term "operation or use" to reject the school district's claims that because the bus was stationary, and, at most, idling, it was doing or performing a practical work and could not constitute the operation or use of a motor vehicle. The court found that the bus motor powered the fan that caused injury to JIC, and absent the motor's power, the fan would have been incapable of causing the injury. As a result, the court found that JIC properly pleaded a waiver of the school district's governmental immunity.

Governmental Immunity-Tort: *Jarpe v. City of Lubbock*, No. 07-17-00316-CV, 2019 WL 2529670 (Tex. App.—Amarillo June 19, 2019) (mem. op.). In this Texas Tort Claims Act Case, the Seventh District Court of Appeals reversed the lower court's grant of plea to the jurisdiction because the officer's actions did not fall within the emergency exception to the general waiver of immunity in negligence actions involving the use of a motor-driven vehicle.

Alexa Jarpe and Jeremy Leech were involved in a car accident with a City of Lubbock police officer, Officer Cooke. On the night in question, Jarpe was driving and attempted to exit a parking lot and turn on to one of the main throughways. Officer Cooke was responding to an attempted robbery when his car collided with Jarpe's car.

Jarpe argued that governmental immunity was waived by the city under the Texas Tort Claims Act because the officer was operating a motor vehicle at the time of the accident and the officer's actions did not fall within the official immunity exception to waiver. The city argued that immunity was not waived because the officer was responding to an emergency during the course and scope of his employment. Government employees are entitled to official immunity when

they are acting in good faith in the performance of a discretionary duty within the scope of their employment. An officer acts in good faith when responding to an incident if the reasonably prudent officer would have believed that such a response to the incident outweighed the risk to public safety.

The court held that sovereign immunity was waived because Officer Cooke did not act in good faith when responding to the incident. Officer Cooke was traveling twenty-three miles over the speed limit and did not have his sirens or lights on, both of which violated the police department's policy. He also admitted to glancing down at his on-board mobile date computer at the time of the incident. All these actions presented a risk to public safety. At the time Officer Cooke chose to respond, the robbery had been de-escalated. Two other officers had already responded to the robbery and the suspect had fled the scene, thus Officer Cooke's response to the situation was not reasonable.

The court held that Officer Cooke's actions were not in good faith because a reasonably prudent officer would have acted differently. Therefore, the city's sovereign immunity was waived because the officer's actions did not fulfill the requirements of the emergency exception to waiver.

Governmental Immunity-Tort: ***City of McAllen v. Quintanilla*****, No. 13-18-00062-CV, 2019 WL 3023325 (Tex. App.—Corpus Christi July 11, 2019) (mem. op.).** In this Thirteenth District Court of Appeals case, the court reversed and rendered judgment in favor of the City of McAllen, dismissing the case for lack of jurisdiction.

Quintanilla slipped and fell at a bus station owned by the city. He did not have a bus ticket but was there to send off his aunt who did have a ticket. Quintanilla brought a premises liability claim under the Texas Tort Claims Act (TTCA). The city filed a plea to jurisdiction, which was denied at the lower court. The city appealed that decision and asserted that the lower court did not have subject matter jurisdiction.

The TTCA provides a limited waiver of immunity for the conditions or use of real property. The defendant must prove that the governmental entity breached the duty owed for immunity to be waived. Governmental entities owe a lesser duty to licensees than they do to invitees. Quintanilla argued that the city owed him the duty owned to an invitee because he was there with his aunt who had purchased a ticket. To be an invitee, a person must have paid to be on the premises. The court concluded that the purchase of a ticket by Quintanilla's aunt did not mean he paid to be on the premises and thus was only owed the duty owed to a licensee.

The duty owed to a licensee required the owner to not "injure a licensee by willful, wanton, or grossly negligent conduct, and that the owner use ordinary care either to warn a licensee of, or to make reasonably safe, a dangerous condition of which the owner is aware and the licensee is not". The court held that there was no evidence that the city was grossly negligent in its behavior, nor did any of the employees have actual knowledge of the hazardous condition. Therefore, the city did not breach its duty and immunity was not waived under the TTCA.

Governmental Immunity-Tort: ***Nguyen v. SXSW Holdings, Inc.*****, No. 14-17-00575-CV, 2019 WL 3231057 (Tex. App.—Houston [14th Dist.] July 18, 2019).** After a driver maneuvered around a barricade and accelerated into a group of South by Southwest ("SXSW") festivalgoers ("plaintiffs"), killing four people and injuring several others, some of the injured parties and their survivors filed a civil action against the City of Austin and organizers of SXSW (the driver was charged with capital murder and convicted). The plaintiffs' sued to recover on claims of negligence, premises liability, and public nuisance, arguing that the safety measures were inadequate to protect pedestrians and that it was foreseeable that a vehicle would penetrate the barricades and collide with festivalgoers. The defendants filed several different summary judgment motions. The trial court merged all defendants' summary judgment motions into a final take-noting judgment. The plaintiffs appealed.

The trial court's final judgment did not identify which one of the city's summary judgment motions it granted, so on appeal the court considered the city's jurisdictional argument that the city did not waive its governmental immunity. The court held that the trial court should have granted the city's jurisdictional challenge, primarily because the plaintiffs' complaints relate to the adequacy of police protection, barricades, traffic control plans, and the maintenance of traffic hazards, all of which would be considered to be a governmental function for purposes of the Texas Tort Claims Act. Plaintiffs' contended that the city was actually engaged in a proprietary function because it was operating an amusement along with the other defendants. However, because the city did not own SXSW, the court could not conclude that the city engaged in a proprietary function on that basis. Because the plaintiffs' pleadings were unable to clearly articulate a valid waiver of immunity, the city retained its immunity. The court concluded that the trial court should have dismissed the plaintiffs' claims against the city for want of jurisdiction.

Governmental Immunity-Tort: ***Maspero v. City of San Antonio*****, No. 04-18-00286-CV, 2019 WL 4044036 (Tex. App.—San Antonio Aug. 28, 2019) (mem. op.)**. This is an appeal of the trial court's order granting the City of San Antonio's plea to the jurisdiction in a personal injury case.

Narcotics detectives requested two police officers, Sergeant Scaramozi and Officer Kory, to conduct a traffic stop of an individual driving a suburban suspected of carrying drugs. Officer Kory responded, followed the suburban, and activated her lights. The suburban slowed down and pulled onto the shoulder, but then suddenly sped up and onto the main lanes of an interstate highway. Officer Kory initiated a chase of the vehicle, which was travelling over 100 mph while weaving in and out of rush hour traffic. When the suburban drove down a grass median and onto the frontage road, she followed the vehicle and exited the interstate at a speed of up to 94 mph. The suburban then drove through an intersection and lost control. Officer Kory proceeded to where the suburban had crashed, but the suburban suddenly emerged driving towards her. To avoid impact, Officer Kory veered off the right shoulder. The suburban drove past her and crashed head-on into Jimmy and Regina Masperos' vehicle. The crash killed the Masperos' sons and injured their two surviving children. The Masperos' sued the city for negligence alleging that the city was liable because Officer Kory and Sergeant Scaramozi's negligent and reckless actions

proximately caused the crash. The city filed a plea to the jurisdiction, arguing immunity from suit. The trial court granted the plea. The Masperos' appealed.

The court of appeals first looked at whether the city's immunity under the Texas Tort Claims Act (TTCA) had been waived by the operation or use of a motor-driven vehicle. The court determined that there was a nexus between Officer Kory's operation of a motor vehicle and the Masperos' injuries because Officer Kory was actively operating her vehicle at the time of the crash; she used her patrol car to chase the suspect in her efforts to apprehend him; and her decision to use her patrol car to chase the suspect without activating her siren was a "but-for-cause" of the suburban's crash.

The court then looked at whether the city was immune under the "emergency exception" of the TTCA. The court found that Officer Kory knew the substantial risks to the public of initiating and continuing a high-speed chase of a suspect and did not care about the result because she continued the chase even though she did not believe she could catch the suburban. As such, the emergency exception did not apply.

Finally, the court looked at whether the trial court erred in dismissing the Masperos' claim of negligent implementation of a policy, Procedure 609, which permits an officer to engage in a chase only when the benefit of apprehension outweighs the risk to the public. The court concluded that the Masperos' had established some evidence sufficient to create a fact issue about whether Procedure 609 was violated. They showed that Officer Kory's chase began as routine traffic stop of a driver who was only a suspect, and that Sergeant Scaramozi did not verbally authorize Officer Kory to pursue the suspect. As a result, the trial court erred in dismissing the Masperos' negligent implementation of a policy claim.

The court reversed the trial court's order and remanded the case for further proceedings.

Governmental Immunity-Tort: *Kirstein v. City of South Padre Island*, No. 13-18-00574-CV, 2019 WL 4200298 (Tex. App.—Corpus Christi Sept. 5, 2019) (mem. op.). Sean Kirstein was arrested for public intoxication in June 2018. While detained in jail, Kirstein was attacked by his cellmate and suffered multiple injuries. Kirstein sued the city, arguing that the city's arresting officer and jailer should have known that due to the many prior times they had arrested Kirstein for alcohol-related offenses that he was a violent drunk. According to Kirstein, the city was negligent for a number of reasons, including the lack of adequate facilities for separating and monitoring inmates, for failing to follow written policies and procedures governing the jail; for the jailers not receiving adequate training, and for allowing the jailers to watch television at the booking desk thereby taking their attention away from the assault. The city filed a plea to the jurisdiction, which was granted by the trial court. Kirstein appealed.

In his sole issue on appeal, Kirstein argued that the trial court erred in granting the city's plea to the jurisdiction because his injuries were proximately caused by negligent actions involving a condition or use of tangible or real property (the jail), and the city's immunity was therefore waived under the Texas Tort Claims Act. However, the court held that Kirstein's claims do not allege more than mere incidental involvement of the jail and the cell he was placed in, and he did not show that the condition or use of the jail were substantial factors in bringing about his

injuries. Thus, the court rejected Kirstein's arguments that the city waived immunity because it lacked adequate facilities or failed to transfer one of the inmates. Further, because written information in the form of instructions and manuals is not tangible personal property, the court held that the city's alleged failure to provide adequate "jail detention training" did not give rise to a claim under the Texas Tort Claims Act.

Kirstein also claimed that allowing the jailers to watch television at the booking desk in violation of the city's rules and regulations represented the negligent implementation of a formulated discretionary policy for which the Texas Tort Claims Act waives immunity. However, the court held that the use of the television by the jailers was not the cause-in-fact or proximate cause of Kirstein's injuries, so the city's immunity was not waived. The court overruled Kirstein's issue and affirmed the trial court's judgment.

Governmental Immunity-Tort: *City of Houston v. Cruz*, No. 14-18-00080-CV, 2019 WL 4021881 (Tex. App.—Houston [14th Dist.] August 27, 2019) (mem. op.). Francisco Cruz sued Jailene Reyes in November 2017 after Reyes ran a red light at an intersection and collided with Cruz's vehicle. In April 2017, Reyes moved to add the City of Houston as a third-party defendant, arguing that the city was negligent under theories related to the red light. The city filed a plea to the jurisdiction arguing that Cruz did not give the requisite 90-day notice under the city's charter, or the six-month notice under the Texas Tort Claims Act. Cruz's attorney did send the city a letter related to the incident in March 2017 but referenced an accident on behalf of their client "Francisco Lopez" instead of a "Francisco Cruz." The city secretary submitted two affidavits indicating that it did receive notice of a claim for damages on a Francisco Lopez but not Francisco Cruz. Cruz did not dispute that the attorney failed to timely provide the requisite notice, but attached documents indicating the city was aware of the malfunctioning traffic signal on the day the accident occurred. The trial court ultimately denied the city's plea and the city appealed.

The only question on appeal was whether the evidence raised a fact issue as to the city's actual, subjective notice of (1) a death, injury, or property damage; (2) the city's fault that produced or contributed to the death, injury, or property damage; and (3) the identity of the parties involved. The court recognized the city secretary's affidavits as evidence supporting the city's assertion that it lacked the subjective notice required under the Texas Tort Claims Act. Cruz did not object to those affidavits or offer controverting evidence, but instead submitted records showing the city knew there was a problem with the traffic lights at the intersection. The court held that because Cruz did not file either an affidavit explaining the need for further discovery or a verified motion for continuance, there was no evidence in the record that the city received timely notice of Cruz's claim or had actual notice of it. Lack of notice is an incurable jurisdictional defect. The court rendered judgment dismissing Cruz's claims against the city for lack of subject matter jurisdiction.

Governmental Immunity-Tort: *City of Brownsville v. Brownsville GMS, Ltd.*, No. 13-19-00467-CV, 2019 WL 4741730 (Tex. App.—Corpus Christi September 27, 2019) (mem. op.). This is a governmental immunity/contract case where a temporary injunction was sought. The court held the trial court's failure to rule on the city's plea to the jurisdiction was not a denial of

the city's plea because a simultaneous separate interlocutory appeal was filed staying the proceedings.

Brownsville GMS, Ltd. (GMS) sued the City of Brownsville, the mayor, and the city commission members complaining of the manner in which the city awarded its waste disposal contract. GMS obtained a temporary injunction to preclude the city from acting on the award and an order for expedited discovery. The individuals filed motions to dismiss based on Texas Civil Practice and Remedies Code Section 101.06(e). The city also filed two pleas to the jurisdiction asserting immunity. The trial court scheduled multiple motions to be heard on August 13, 2019. The trial court denied the motions to dismiss during the hearing. The individuals filed an interlocutory appeal during the hearing for the denial. The trial court did not rule on any other motions during the hearing as the proceedings were stayed.

The city also appealed and argued that the trial court's refusal to rule on its pleas to the jurisdiction invokes the implicit ruling doctrine and cites *Thomas v. Long*, 207 S.W.3d 334 (Tex. 2006). In *Thomas*, the implicit ruling was predicated on the trial court's grant of affirmative relief to Long while at the same time failing to rule on Thomas's plea to the jurisdiction. The trial court did not have authority to grant the relief Long sought unless it affirmatively determined that it had jurisdiction. Here, the trial court became aware that DeLeon filed an instantaneous interlocutory appeal, thereby staying all proceedings. The trial court correctly recognized it did not have the power to rule on the pleas and adjourned the hearing. Because the trial court had no authority to rule on the pleas it did not implicitly deny the pleas. The appellate court therefore lacks jurisdiction to hear the city's appeal.

Governmental Immunity-Tort: *Juarez v. Harris Cty.*, No. 01-18-00690-CV, 2019 WL 5699741 (Tex. App.—Houston [1st Dist.] Nov. 5, 2019) (mem. op.). This is a Texas Tort Claims Act case where Harris County asserted that the emergency response exception applied to officers' pursuit of suspected dangerous felons.

The case involves a police pursuit of three individuals in a stolen truck who were suspected of armed robbery. After seeing the three individuals get into a stolen truck and drive off, the officers attempted to make a routine traffic stop. The suspects then fled and the officers pursued in the chase. The officers noted, among other things, that the driver's hazardous driving created a danger to the public that required intervention and outweighed the risks of a vehicle pursuit. The officers conducted their pursuit by monitoring their speed and the driving conditions and proceeding carefully through traffic and intersections.

The county asserted it was immune because the officers were responding to an emergency under the emergency response exception. The First Court of Appeals noted that the term "emergency" is construed broadly and concluded that the facts in the case were sufficient to show that the officers were responding to an emergency. The court found that the officers did not violate the Transportation Code provisions related to operating an emergency vehicle because they did not operate with reckless disregard for the safety of others. The burden shifted to the plaintiff to show that there was a disputed issue of material fact. The plaintiff merely made conclusory

statements in opposition, such as the officers could have used other methods to arrest the suspects that would not have ended in a high-speed chase or they did not follow their training.

The First Court of Appeals rejected the plaintiffs' conclusory arguments and found that the county presented sufficient evidence to show that the emergency response exception applied and affirmed the trial court.

Governmental Immunity-Tort: *Tarrant Cty. v. Green*, No. 02-19-00159-CV, 2019 WL 5460679 (Tex. App.—Fort Worth Oct. 24, 2019) (mem. op.). This is a Texas Tort Claims Act (TTCA) case where the Fort Worth Court of Appeals reversed the denial of the county's plea to the jurisdiction based on an intentional tort.

While Green was a jail inmate, he asserted Corporal Davis at the jail pointed a temperature gun (which utilized a laser for measurements) at his left eye causing injury. Corporal Davis admitted to using a laser temperature gun, but denied the laser impacted Green. Green testified that he does not believe Davis hit him with the laser intentionally. However, he testified Davis pointed the temperature gun at him as a result of Green telling a joke about Davis moments before. The county filed a plea to the jurisdiction asserting Green alleged an intentional tort, even though Green disclaimed the injury was performed intentionally. The trial court denied the plea and the county appealed.

Although the specific intent to inflict injury is unquestionably part of some intentional torts, a specific intent to injure is not an essential element of a battery, which does not require physical injury, and which can involve a harmful or offensive contact intended to help or please the plaintiff. The court noted that accidental injuries can sometimes result from an intentional tort. The court drew a distinction between criminal and civil analysis for "intentional" conduct regarding battery. Green's allegations constitute a common-law battery claim because the contact — either offensive or provocative — was an intentional act made in response to Green's own provocative statement. As battery is an intentional tort, no waiver of immunity existed. The plea should have been granted.

Governmental Immunity-Tort: *Gomez v. City of Houston*, No. 14-17-00811-CV, 2019 WL 5580134 (Tex. App.—Houston [14th Dist.] Oct. 29, 2019) (en banc op.). Bobby Joe Simmons, a City of Houston police officer, was responding to a robbery call when his car collided with a vehicle driven by Maria Christina Gomez. Gomez sued the city, alleging negligence. The city filed a plea to the jurisdiction asserting that it was immune from suit, and the trial court granted the city's plea and dismissed the lawsuit. Gomez appealed.

In December 2018, a panel of the Fourteenth District Court of Appeals reversed the trial court's judgment and remanded the case to the trial court. The city filed a motion for en banc reconsideration, which was granted. The court withdrew the earlier opinion and issued this en banc majority opinion, although the result does not vary from the opinion issued in December of 2018.

On appeal, the first question was whether Officer Simmons could be personally liable to Gomez under Texas law, as required under the Texas Tort Claims Act to waive governmental immunity.

The city contended that the evidence conclusively established that Officer Simmons responded to the robbery call in good faith, and therefore could not be personally liable to Gomez under Texas law, meaning the city should retain its governmental immunity. But the court held that the city's evidence of good faith assumes the truth of a disputed fact – that Simmons was using his overhead emergency lights as he approached the intersection. No witnesses testified that the standard for good faith was satisfied if Simmons did not use his car's overhead emergency lights. Consequently, the court held that the city did not meet its burden to conclusively prove Officer Simmons' good faith. The trial court erred to the extent it granted the city's plea to the jurisdiction on the ground that the city's governmental immunity had not been waived under the Texas Tort Claims Act.

In her second issue, Gomez argued that the trial court erred to the extent it granted the city's plea based on the emergency exception to the waiver of immunity in Section 101.021 of the Civil Practice and Remedies Code. The city claimed that because it established that Officer Simmons did not act recklessly, the city was immune from suit. The court disagreed, holding that there was a material question of fact regarding whether Officer Simmons acted recklessly or with conscious indifference to the safety of others. Evidence showing that Officer Simmons did not slow his speed to compensate for the wet conditions, did not use his patrol car's siren and possibly the emergency lights, and did not maintain visual contact with the road as he approached the intersection could support a finding that he acted recklessly. Because there was a fact issue on whether Officer Simmons' acted recklessly, the court sustained Gomez's second issue.

The court reversed the trial court's judgment and remanded the case to the trial court for further proceedings consistent with the opinion.

Governmental Immunity-Tort: *City of Houston v. Miller*, No. 01-19-00450-CV, 2019 WL 7341666 (Tex. App.—Houston [1st Dist.] Dec. 31, 2019) (mem. op.). This is a Texas Tort Claims Act case that focuses on the notice provisions of the statute. The trial court denied the city's plea to the jurisdiction on the grounds that it did not have timely notice of Miller's claims.

The city's charter requires notice within 90 days of the date of the incident. Miller was thrown from his motorcycle after riding over a pothole. He sent a letter to the city outside of the city's 90-day notice period. Miller argued the city had actual notice despite the fact he did not provide formal notice within the deadline. He claimed the city had to be aware of the defective condition because it should have known about it. The First Court of Appeals rejected that argument because Miller failed to present evidence that the city had "subjective awareness" of its "alleged fault producing or contributing to the injury." The court reversed the trial court's denial of the city's plea to the jurisdiction and rendered judgment dismissing Miller's claim with prejudice.

Governmental Immunity-Tort: *Deleon v. Villareal*, No. 02-19-00133-CV, 2020 WL 98142 (Tex. App.—Fort Worth Jan. 9, 2020) (mem. op.). This is a Texas Tort Claims Act case that focuses on whether police officers were in the scope of their employment when arresting Deleon and testifying against him. The Second Court of Appeals affirmed the trial court's grant of the officers' motion to dismiss.

The officers arrested Deleon and then testified against him. After a jury acquitted him, Deleon sued the officers for negligence per se and intentional infliction of emotional distress. The officers filed a 91a motion to dismiss on the grounds that the lawsuit could have been brought against the City of Saginaw under Texas Civil Practice and Remedies Code Section 101.106(f). Deleon refused to amend his petition to dismiss the officers and sue the city.

Section 101.106(f) requires mandatory dismissal of the individuals if the suit could have been brought against the city. Section 101.106(f) "provides the appropriate avenue for dismissal of an employee [of a governmental unit] who is considered to have been sued in his official capacity," that is, when suit "is brought against a government employee for conduct within the general scope of his employment and, when suit could have been brought under the [Texas Tort Claims Act] against the government."

The court concluded the dismissal was proper. Because Deleon's suit against the officers was based on conduct within the general scope of their employment and could have been brought under the TTCA against the city, Deleon's suit was against the officers in their official capacities only. Thus, the officers were entitled to dismissal.

Governmental Immunity-Tort: *City of El Paso v. Lopez*, No. 08-19-00056-CV, 2019 WL 6838005, (Tex. App.—El Paso Dec. 16, 2019). This is a Texas Tort Claims Act (TTCA) case where the El Paso Court of Appeals affirmed the denial of the city's plea to the jurisdiction.

Lopez was traveling on his motorcycle at night when the roadway ended with a concrete barrier and canal. There were neither road signs nor any other type of warnings or lighting. Lopez struck the barrier and was killed. The police investigation report noted "the driver . . . failed to stop for the end of the street or roadway and crashed his bike into the canal." A nearby resident also gave a statement that "there are a lot of cars that crash into the canal" because "[t]here are no warning signs to let you know that the street ends so when people come out of the bars they wind up crashing at the canal." The investigation listed "lack of signs and illumination" as factors in causing the accident. Lopez's family brought a wrongful death claim against the city. The city filed a plea to the jurisdiction, which was denied.

The plaintiffs failed to provide statutory notice of the accident but asserted the city had actual notice of its fault. Citing to the recent Supreme Court of Texas case in *Worsdale v. City of Killeen,* 578 S.W.3d 57 (Tex. 2019), the court held the "critical inquiry is the governmental unit's actual *anticipation* of an alleged claim rather than subjective confirmation of its actual liability." After reviewing the record, the court held the city had actual notice of the claim under the TTCA. Next, the court analyzed whether the concrete barrier was a special defect. Both the canal and the concrete barrier were located on the roadway's path, neither of which was visible in the dark to ordinary motorists. As a result, the court determined it was a special defect and the plea was properly denied.

Governmental Immunity-Tort: *City of San Antonio v. Herrera*, No. 04-18-00881-CV, 2019 WL 3937279 (Tex. App.—San Antonio Aug. 21, 2019) (mem. op.). This is an interlocutory appeal of the trial court's order denying the City of San Antonio's plea to the jurisdiction in a premise defect case.

Elena Herrera was exiting an elevator and fell as a result of a condition created by the curb and ramp leading to the parking garage owned and operated by the city. She sued the city for injuries she sustained as a result of the fall alleging that the city negligently created the dangerous condition, allowed it to exist, and failed to warn about the condition. The city filed a plea to the jurisdiction asserting that the premise liability claim arose out of its discretionary powers, for which the city retains immunity. The trial court denied the plea. The city appealed.

The court of appeals analyzed whether the city's failure to provide visible contrast between the curb and flares or to warn about the alleged hazard in the garage falls within the discretionary function exception to the waiver of governmental immunity. Because the city is not required by law to create contrast between the curb and flares, the court concluded that city's decision about what safety features to use and whether to provide additional warnings are discretionary decisions for which the city may not be sued. Accordingly, the court reversed the trial court's order denying the city's plea to the jurisdiction.

Governmental Immunity-Tort: *Johnson v. Woodlands Township*, No. 09-18-00247-CV, 2020 WL 1479715 (Tex. App.—Beaumont Mar. 26, 2020) (mem. op.). In July 2016, Johnson injured his knee when he slipped from a diving board at one of The Township's community pools. Johnson sued The Township (a governmental entity) alleging negligence and gross negligence caused his fall. The Township filed a combined plea to the jurisdiction and no-evidence motion, which was granted by the trial court.

Johnson appealed, arguing the trial court erred by: (1) granting The Township's plea to the jurisdiction; (2) granting The Township's motion for summary judgment; and (3) considering unreliable evidence when it granted the combined plea.

The appellate court concluded that the Recreational Use Statute applied to Johnson's claims. As a result, in response to The Township's combined plea, Johnson needed to produce evidence to demonstrate a genuine issue of material fact existed on his gross-negligence claim. Johnson's evidence showed only that The Township was unaware of the procedures the manufacturer recommended about using and maintaining the diving board. The Township did inspect and maintain its pools, and its inspection procedures included inspecting the pool's diving boards. An entity's failure to follow a manufacturer's recommended practice, without more, fails to show the entity knew of the risk created by not following inspection procedures and did not care.

Johnson failed to establish any of the Tort Claims Act's waivers apply to his claims. The trial court's judgment was affirmed.

Governmental Immunity-Tort: *Jones v. Board of Trustees of Galveston Wharves*, No. 01-19-00671-CV, 2020 WL 937016 (Tex. App.—Houston [1st Dist.] Feb. 27, 2020). This is a Texas Tort Claims Act case where the appellate court determined that the Port of Galveston did not have actual notice of the plaintiff's claims because she claimed no injury when the port's employee contacted her after the incident.

Jones did not provide notice of her claim to the port within the required six months. Instead, she claimed the port had actual notice of her claim. To have actual notice, the port must have had

subjective awareness of her claim. The port knew Jones slipped and fell because of water. A security guard informed a port employee investigating the claim that Jones's right knee and foot were red afterward. However, Jones herself told the port employee that she was ambulatory, was not injured, and did not need medical assistance. Based on the record, the port did not have actual notice and the trial court properly granted the plea to the jurisdiction.

Governmental Immunity-Tort: *City of Houston v. Lal*, No. 01-19-00625-CV, 2020 WL 937026 (Tex. App.—Houston [1st Dist.] Feb. 27, 2020). This is a Texas Tort Claims Act motor-vehicle accident case. The First Court of Appeals affirmed the denial of the city's plea to the jurisdiction.

An off-duty police officer in his city-issued vehicle collided with the plaintiff when the officer looked at his city-issued cell phone and veered into oncoming traffic. The plaintiff sued and said the officer was in the course and scope of his employment at the time of the accident. The city filed a plea to the jurisdiction on the grounds that the officer was not in the course and scope of his employment with the city, which was denied. The city appealed.

The appellate court noted that "[w]hether a peace officer was on duty or off is not dispositive as to whether he was acting within his employment's scope." *Garza v. Harrison*, 574 S.W.3d 389, 405 (Tex. 2019). Instead, the inquiry focuses on what the officer was doing and why he was doing it. Just the fact that the officer was on call at the time of the accident does not mean he was within the course and scope of his employment.

The appellate court determined that a reasonable factfinder could infer that the officer was acting in the course and scope of his employment when checking his city-issued phone to see if he needed to return to duty. Since the officer was on call, he had to monitor his city-issued phone for incoming work-related calls. The important inquiry is whether there is a connection between the officer's job duties and the tortious conduct. The appellate court found that there was. Therefore, the trial court properly denied the city's plea and the appellate court affirmed.

Governmental Immunity-Tort: *Harris Cty. v. Park at Westcreek, LP*, No. 01-18-00343-CV, 2020 WL 826725 (Tex. App.—Houston [1st Dist.] Feb. 20, 2020). This case is about a dispute over the ownership of an easement. The First Court of Appeals affirmed the trial court's denial of the county's plea to the jurisdiction.

The county, Park at Westcreek, L.P. (Westcreek), and several public storage companies all owned part of the same tract of land. The original owners dedicated a 40-feet-wide easement of land that crossed from the main frontage road westward across the tract. The easement was dedicated for road purposes that should be privately owned and maintained but would be dedicated to the public. Furthermore, the dedication stated that if the public ceased to use the right-of-way, then the easement terminated. The county and the public storage companies purchased portions of the tract along the frontage road. Westcreek purchased a portion of the tract to the west of the county's property. Westcreek was assigned a nonexclusive right to the use of the easement on the southern 20 feet of the county's property and northern 20 feet of the public storage companies' property.

Westcreek has access to its apartments from two other nearby roads. It sought permission from the county to construct an entrance on the easement to increase accessibility. The county denied Westcreek's request.

Westcreek sought a declaration of its legal rights to an easement on land owned by the county. The county filed a cross-action against three public storage companies and Westcreek, asserting the county had adversely possessed the property. Westcreek then amended its pleadings to include a takings claim and that the easement dispute was a boundary dispute. The county settled with the public storage companies. The county then filed a plea to the jurisdiction on the grounds that it was immune from Westcreek's claims.

The parties all filed various iterations of their pleadings and the county filed a plea to the jurisdiction on the grounds that Westcreek did not plead the necessary legislative waiver and that the county had not waived its governmental immunity from suit. Westcreek responded that the county had waived its immunity by seeking affirmative relief, citing *Reata Construction Corp. v. City of Dallas*, 197 S.W.3d 371 (Tex. 2006). The trial court denied the county's plea but did not state the reason why.

The appellate court first addressed the county's arguments that it had governmental immunity and that it did not waive governmental immunity by filing its cross-action. The county asserted it was generally immune from suit for land. However, the court determined *Reata* applied and the county waived its immunity by asserting affirmative claims. When asserting its adverse possession claim to ownership of the easement, the county left the "sphere of immunity from suit for claims against it which are germane to, connected with, and properly defensive to claims" the county asserted. In analyzing this argument, the court determined that the county had filed cross-claims against the public storage companies and Westcreek. Although the county nonsuited its claims against the property storage companies, it did not nonsuit its claims against Westcreek. Additionally, nonsuiting of affirmative claims does not impact the *Reata* analysis. The court also rejected the county's argument that it must plead a claim for monetary damages for the trial court to acquire jurisdiction under *Reata*. Thus, the appellate court concluded the trial court properly denied the county's plea to the jurisdiction.

Next, the appellate court considered the county's third argument that it was immune from Westcreek's constitutional taking or inverse condemnation claim because Westcreek failed to allege an actionable takings claim. The appellate court noted that the county had acknowledged the nature of Westcreek's property interest necessarily depended on the status of the easement. The county's argument implicated the underlying merits of the case, which the appellate court determined is inappropriate to consider on a plea to the jurisdiction. Therefore, it overruled the county's third issue.

Governmental Immunity-Tort: *City of San Antonio v. Riojas*, No. 04-19-00220-CV, 2020 WL 907573 (Tex. App.—San Antonio Feb. 26, 2020). This is an interlocutory appeal of the denial of a plea to the jurisdiction in a case involving a motor vehicle accident in which the court affirms the trial court's order.

Officer Tristan was driving his patrol vehicle on the freeway. He activated his emergency lights after he moved to an exit lane and traffic began to slow down for no obvious reason. This in turn caused his vehicle's dash cam to begin recording and his microphone to be activated shortly thereafter. In his affidavit, Officer Tristan stated that, around the time he turned his lights on, he saw a white vehicle driven by Olvedo crossing several lanes of traffic in an attempt to exit the freeway. However, the dash cam video showed Olvedo, who was driving a white car, moving into the far-right main lane and breaking for unknown reasons. The video also showed another white car next to Olvedo merging into Olvedo's lane, cutting her off, and briefly stopping before driving away. Olvedo then suddenly crossed two solid white lanes separating the exit lane from the three main lanes and exiting the highway. Officer Tristan concluded that Olvedo had made an improper lane change and impeded traffic behind her. After Olvedo exited, Officer Tristan radioed a nearby police officer to pull her over and ticket her.

While Officer Tristan was watching Olvedo in the right lane, Riojas was driving his motorcycle in the far-left lane directly behind a car driven by Vela. Riojas and Vela were behind Officer Tristan. Riojas saw Vela braking and took an evasive action to avoid hitting her. He then lost control of his motorcycle, fell off, and came to rest near a concrete barrier. His motorcycle slid and hit the back of Vela's car. As Officer Tristan maneuvered his vehicle to the location where Riojas was located, he remarked that a white vehicle, presumably Olvedo's car or the other car, had caused the accident. Three other people – Vela and two unidentified men – stopped to help Riojas. The unidentified men approached Officer Tristan and told him that they believed the wreck was his fault and that by activating his emergency lights, he scared everybody on the street. Vela stated that he slowed down because the car in front of her slowed down. Officer Tristan stated that he turned on his lights after he saw Rioja's motorcycle sliding, but his police report provides that he saw the motorcycle after he turned on his lights.

Riojas sued the city for his injuries, and later amended his petition to include Olvedo and the owner of the car she was driving as defendants. The city filed a plea to the jurisdiction arguing that the city was immune because: (1) the accident was not caused by Officer Tristan's activation of his emergency lights and therefore did not arise from the operation or use of a motor-driven vehicle; and (2) officer Tristan performed a discretionary duty in good faith and was entitled to official immunity. The trial court denied the plea, and the interlocutory appeal followed.

First, the court first looked at whether liability was waived under the Texas Tort Claims Act's provision for personal injury "arising" from the operation or use of a motor-driven vehicle. The court initially reviewed the city's argument that the eyewitnesses' statements were speculative and conclusory such that they did not raise a fact issue that anything Officer Tristan did caused Vela or the motorist in front of her to brake. The court concluded that the eyewitnesses' statements were not speculative or conclusory because the eyewitnesses were physically present in the moments leading up to the accident and immediately afterward, and that their opinions were based on their perceptions that there was no reason for Officer Tristan to activate his lights, and that he scared everybody on the street by doing so. As such, the eyewitnesses' opinions presented more than a scintilla of evidence that the accident would not have occurred but for Officer Tristan unexpectedly and inexplicably activating his emergency lights.

The court then looked at the city's argument that Officer Tristan's use of his vehicle was merely a condition that made the accident possible. In finding that Officer Tristan's operation or use of his vehicle did not merely furnish a condition that made the accident possible, the court distinguished this case from Supreme Court of Texas precedent. The court found that there was evidence that Rioja's wreck occurred contemporaneously or nearly contemporaneously with Officer Tristan's activation of his lights under circumstances that made two eyewitnesses conclude that Officer Tristan's operation or use of his vehicle triggered the wreck.

The court also addressed the city's argument that Officer Tristan's conduct was too attenuated from the wreck to have caused it because Rioja's wreck occurred "three lanes away" from Officer Tristan's patrol vehicle, Rioja's motorcycle did not strike Officer Tristan's vehicle, and the wreck was too geographically and temporarily removed from Officer Tristan's activation of his emergency lights to have arisen from that action. The court determined that because the Transportation Code requires drivers to stop and remain standing until a police vehicle displaying its emergency lights drives away, the city is unable to show as a matter of law that no vehicle in the far-left lane was required to brake in response to anything Officer Tristan did in the far-right exit lane.

Second, the court addressed the city's claim that it is immune from Rioja's claims because Officer Tristan is entitled to official immunity. The court applied the "need to take action" versus the "risk of harm the action posed to the public" analysis to determine if Officer Tristan acted in good faith so as to qualify for official immunity. The court concluded that Officer Tristan's affidavit was nothing more than a "simple subjective pronouncement of good faith" that was not supported by a showing that he needed to balance the need he perceived with the potential risk posed by his chosen course of action. As such, he was not entitled to official immunity.

Finally, the court concluded that Rioja's allegations against a newly added defendant did not constitute clear, deliberate, and unequivocal admissions that essentially amounted to an abandonment of his original claims against the city.

Governmental Immunity-Tort: *Crockett Cty. v. Damian*, No. 08-19-00145-CV, 2020 WL 814013 (Tex. App.—El Paso Feb. 19, 2020). On March 2, 2017, Miguel Damian died from injuries he sustained at work after he was run over by a road maintainer operated by Adam De La Garza (De La Garza), a Crockett County employee.

Appellees filed their original petition to bring suit against De La Garza, Crockett County, and the Crockett County Road Department for the wrongful death of Damian. The original petition raised only state-law torts claims under the Texas Tort Claims Act (TTCA). The county's original answer raised the affirmative defense of governmental immunity and argued any claims against De La Garza are barred by Section 101.106(e) of the TTCA. The county filed a motion to dismiss pursuant to Section 101.106(e), admitting that De La Garza was a county employee and that the county was entitled to dismissal of all claims against De La Garza because the Appellees failed to elect between suing the county and its employees before filing suit. Appellees did file an amended petition which added a state common-law negligence claim against De La Garza in his individual capacity for acts committed outside the course and scope of his county

employment, drinking excessively and staying up late the night before he was required to report to work early the following day. The Appellees conceded the tort claim brought against De La Garza in his official capacity in the original petition required dismissal because it was brought under the TTCA, however, their subsequent state common-law negligence claims against De La Garza in his individual capacity was not subject to the TTCA and should not be dismissed. The trial court agreed with the Appellees and dismissed the tort claims based on acts committed within De La Garza's employment, but denied the motion as to tort claims based on acts committed outside of the scope of his county employment.

In this interlocutory appeal, the court of appeals reversed the trial court's order denying in part the county's motion to dismiss and render judgment dismissing all of the Appellees' state-law-tort claims against De La Garza. The court found that the trial court should have also dismissed the tort claims based on acts committed outside of the scope of De La Garza's county employment because Section 101.106(e) of the TTCA requires plaintiffs to choose, before filing suit, between suing a governmental entity or suing an employee in his individual capacity. If the plaintiffs do not make the choice before filing suit, the governmental unit may file a motion to dismiss all state-law-tort claims against its employee by effectively confirming the employee was acting within the scope of employment and that the government, not the employee, is the proper party. The county did this when it filed its motion to dismiss. Because the Appellees filed against both, instead of filing only against De La Garza in his individual capacity, the Appellees forfeited all state-law negligence claims and are barred from bringing any state-law-tort claim against De La Garza regarding the same subject. The court also distinguished this case from Texas *Dep't of Aging & Disability Svs. v. Cannon*, 435 S.W.3d 411(Tex. 2015) because Cannon added a claim under 42 U.S.C. §1983, a federal claim, which is a non-state-law-tort claim, and therefore was not subject to the dismissal of the state-law-torts claim under the TTCA.

Governmental Immunity-Tort: *Harris Cty. v. Coats*, No. 14-17-00732-CV, 2020 WL 581184 (Tex. App.—Houston [14th Dist.] Feb. 6, 2020). This is a Section 1983/wrongful death case where the Fourteenth Court of Appeals reversed, in part, a jury award against the county and its deputy.

Jamail and his girlfriend were using cocaine when Jamail felt ill. Jamail exited through a window and called 9-1-1 from a public phone. However, when the emergency medical technicians (EMTs) arrived, Jamail ran from the area to a nearby Burger King. Deputy Saintes arrived after a disturbance call, handcuffed Jamail and walked him to the ambulance. When they neared the ambulance, Jamail became combative and attempted to run. Multiple deputies arrived and assisted Deputy Saintes to subdue Jamail. EMTs gave Jamail an injection of a sedative. Jamail was seen breathing normally. The parties dispute whether Deputy Vailes' boot was on Jamail's nose and mouth at the time. However, after a short while, he could not be roused. He was transported to a nearby hospital where he died. The family sued. Multiple individuals and parties settled their claims or were dismissed based on immunity. A jury trial was held against the county and Deputy Vailes. The jury found for Jamail's family. The county and Deputy Vailes appealed.

The court first determined no county policy, custom, or practice existed to establish Section 1983 liability as to the entity. Normally, single incidents cannot create a policy, custom, or practice. As far as constables go, the fact that a constable's jurisdictional reach is throughout the county does not support the trial court's conclusion that the Precinct Four Constable is a law enforcement final policymaker for Harris County. Jamail's burden was to identify a final policymaker who speaks on law enforcement matters for the local government unit at issue—Harris County, not simply a precinct.

As to Deputy Vailes, the court held some evidence existed that Deputy Vailes placed his boot on Jamail's face when he was already handcuffed. The law was sufficiently clear that every reasonable official would understand (as did those who testified) that stepping on the nose and mouth of someone who is lying on the ground, likely sedated, handcuffed, and unresponsive, with enough force that the person's neck touches the ground, would constitute an excessive force violation. Therefore, Vailes was not entitled to qualified immunity on that claim. However, the evidence was insufficient that Vailes' actions caused Jamail's death. Deputy Vailes argues that Jamail died because of acute cocaine toxicity, as the medical examiner concluded following Jamail's autopsy. In cases alleging medical injury or death, expert testimony regarding causation is generally the norm and Jamail's family did not produce any regarding the cause of death. The fact that Vailes' boot was placed on Jamail, when he was already non-responsive is insufficient to justify the jury award against Vailes as to Jamail's death. Because of the alterations to the judgment, the court remanded for a reconsideration of the attorney fee award.

Governmental Immunity-Tort: *City of Houston v. Terry*, No. 01-19-00197-CV, 2020 WL 370556 (Tex. App.—Houston [1st Dist.] Jan. 23, 2020) (mem. op.). This is a Texas Tort Claim Act (TTCA) case where the First District Court of Appeals reversed the denial of the city's plea to the jurisdiction and dismissed the case.

Terry was electrocuted while performing maintenance on a communication tower leased by the city. Terry was employed by a contractor at the time, but he was accompanied by a city employee (Hunter) at the site. Before having Terry climb the tower to replace a lightbulb, Hunter was to remove the control box faceplate, which theoretically should cut the power. However, when Terry touched the lightbulb that needed replacing 300 feet up the tower, he was electrocuted. Hunter testified that he did not know the source of the electricity. Hunter maintained that the power was off because: (1) power immediately stops running to the tower when the control box's faceplate is removed, and (2) Terry's injuries would have been far more severe had the power been on. However, evidence showed several capacitors were near the control box and could have retained a charge for a short while. Terry brought claims under the TTCA for injuries resulting from both the use of tangible personal property and for premises defects. The city filed a plea to the jurisdiction. The trial court granted the plea as to the negligent use of personal property but denied it as to the premises defect.

The court held a claim for premises liability is distinct from a claim for general negligence. The TTCA's premises liability provision imposes heightened requirements for liability, and they cannot be avoided by recasting a premises defect claim as one for general negligence. Under a premises defect theory, the city only owed a duty to warn of dangers it had actual knowledge

existed. Failing to turn off the electricity does not fall under a premises defect theory but is a general negligence theory. Premises liability instead concerns nonfeasance theories of liability based on the failure to take measures to make the property safe. Any fact issue relating to Hunter's alleged failure to turn off the electricity to the tower is immaterial to the premises defect analysis. Under a premises defect theory, Terry did not establish a waiver. It is undisputed that any residual electricity stored in the capacitors should have dissipated about a minute or two after the power was turned off. Given that it took Terry at least 30 minutes to climb the tower and reach the lightbulb where he was electrocuted, Hunter's awareness that these capacitors carried a short-term charge does not rise to the level of actual knowledge of a dangerous condition. At most, Hunter's testimony about the tower's capacitors raises an inference that he may have been aware of a hypothetical hazard. That is not enough. Assuming that the tower's capacitors were the source of the electricity that injured Terry, any power they stored was present because that is how the capacitors operate. Hunter, however, did not know they posed a danger. As a result, the plea should have been granted.

Governmental Immunity-Tort: *City of Fort Worth v. Posey,* No. 02-19-00351-CV, 2020 WL 241425 (Tex. App.—Fort Worth Jan. 16, 2020). This is a premises liability/Texas Tort Claims Act (TTCA) case where the Fort Worth Court of Appeals held a fact question exists as to Posey's payment for use of the premises so the plea to the jurisdiction was properly denied.

Posey attended a Christmas gift market put on by the Junior League of Fort Worth at the Will Rogers Memorial Center (WRMC). Posey asserts she paid for entry to the coliseum. The city asserts Posey purchased the entry ticket to enter the gift market from the Junior League and not the city. After the market event, Posey walked down the public sidewalk to return to her car and tripped over an unknown metal object located in the concrete sidewalk. Posey fell and suffered injuries. Under the TTCA, the city owes Posey a duty "that a private person owes to a licensee on private property, unless the claimant pays for use of the premises." TEX. CIV. PRAC. & REM. CODE § 101.022(a). If Posey paid for the use of the premises, she is an invitee; if not, she is a mere licensee. The city filed a plea to the jurisdiction based on lack of actual knowledge required of a licensee. The plea was denied, and the city appealed.

If Posey was a licensee, she must show that the city had actual knowledge of the unreasonable risk of harm created by the obstruction. If she was an invitee, she need only show that the city should have known of the risk—i.e., constructive knowledge. Posey asserts she paid a fee to park at the coliseum, and it is undisputed that the parking fee went directly to the city. Second, Posey offered evidence that she paid a $12 fee to enter Junior League's gift fair, and Junior League, in turn, paid the city to rent the premises. However, the city asserts Posey fell on a public sidewalk for which she did not have to make any payment. One line of cases would agree with the city that the standard should be "but for" the payment, the claimant would not have access to the area. However, because of the text of the TTCA, the court held Posey "paid for the use of the premises" and the fact others could access the same area without paying is immaterial for statutory construction principles. Further, the statute does not say that the claimant must pay for exclusive or nonpublic use of the premises. Posey introduced multiple forms of evidence—including a contract and testimony from the city's own representative—showing that the payments also endowed her with the express right to use the walkway to travel between the

parking lot and the gift fair. As a result, a fact question exists as to whether Posey is considered an invitee or licensee. The plea was properly denied.

Governmental Immunity-Tort: *In re City of Houston*, No. 01-19-00805-CV, 2020 WL 2026978 (Tex. App.—Houston [1st Dist.] Apr. 28, 2020) (mem. op.). The plaintiff in the case sued a City of Houston police officer for injuries arising from an automobile accident. The police officer (who was represented by the City of Houston's legal department) filed a motion to dismiss pursuant to Section 101.106(f) of the Texas Civil Practice and Remedies Code, asserting that he was acting in his capacity as an employee of the city and therefore the suit must be filed against the city. The officer attached a proposed final judgment dismissing the case. The draft judgment was entitled a final judgment, granted the motion to dismiss, and declared that it disposed of all parties and claims. On the same day, the plaintiff amended his petition to remove the officer and add the city as the defendant.

On June 3, 2019, the trial court signed the police officer's proposed final judgment, which provided that it "disposes of all parties and claims and is final and appealable." The judgment does not mention the city.

When the plaintiff tried to schedule depositions with the city, the city refused, citing the final judgment. The trial court amended the final judgment more than 30 days after it entered the judgment. The city filed a writ of mandamus with the First Court of Appeals on the grounds that the judge lacked plenary power to amend the final judgment because more than 30 days had passed after entry of the final judgment.

The appellate court agreed the trial court lacked authority to modify the judgment. First, the judgment was final. The judgment satisfies the first test for finality because it includes finality language stating, "This order disposes of all parties and claims and is final and appealable." The plaintiff did not file any motions that would have extended the court's plenary power beyond 30 days. Therefore, the trial court could not amend the final judgment more than 30 days after its final judgment. The appellate court concluded that the trial court abused its discretion by modifying its final order when it had lost its plenary power.

Governmental Immunity-Tort: *City of Sugarland v. Gaytan*, No. 01-18-01083-CV, 2020 WL 2026374 (Tex. App.—Houston [1st Dist.] Apr. 28, 2020) (mem. op.). This is a Texas Tort Claims Act (TTCA) case where the plaintiff claimed the city was liable for his injuries when a police officer was directing traffic during a triathlon. The plaintiff was biking during the triathlon when a car hit him at an intersection. A city police officer was directing traffic at the intersection and at least one of them directed the car that hit the plaintiff to proceed through the intersection. The car proceeded and then paused in the lane of traffic, disregarding the officer's instruction, which then caused the plaintiff to collide with the car. Plaintiff alleged the city, in controlling traffic, was operating or using the motor vehicle for the purposes of the TTCA. The city filed a plea to the jurisdiction, which the trial court denied.

The city argued that the plaintiff's allegations did not contain an allegation that a city employee was operating a motor vehicle. The court analyzed cases out of other Texas appellate courts,

which found that controlling traffic did not arise from the operation or use of a motor vehicle. The court found that the plaintiff's claims did not arise out of the operation or use of a motor vehicle. However, in doing so, the court noted it was not establishing a bright-line rule that a governmental employee must always be personally driving the motor vehicle to qualify for the waiver of immunity under the TTCA. Even assuming there is no bright-line rule, the plaintiff's claims did not allege that it was the officer who caused his injuries. The officer directed the car through; it was the car's failure to follow the officer's instruction and its pause that injured the plaintiff. The court overruled the trial court and granted the city's plea.

Governmental Immunity-Tort: *Texas Dep't of Transp. v. Ives,* No. 05-18-01527-CV, 2020 WL 1909999 (Tex. App.—Dallas Apr. 20, 2020) (mem. op.). This is a personal injury case in which the court of appeals ruled that the Texas Department of Transportation's (TxDOT's) immunity was not waived under the Texas Tort Claims Act (TTCA).

Ives was driving his car in Collin County when he ran out of gas. He left his car on the shoulder of the road and walked in the grass along the road toward a gas station. He fell into a drop inlet grate and badly injured his leg. TxDOT owned the drop inlet grate. An engineer for TxDOT testified that the area where Ives walked was intended to facilitate water drainage and was not intended for pedestrian traffic.

After a jury trial, TxDOT filed a motion for judgment notwithstanding the verdict, arguing it retained its sovereign immunity. The trial court denied the motion. TxDOT appealed, arguing dismissal was warranted for two reasons: (1) the discretionary exception of the TTCA prevented waiver of sovereign immunity; and (2) there was no evidence TxDOT had the requisite actual knowledge of the alleged danger posed by the drop inlet grate.

The court of appeals first addressed TxDOT's second argument. Ives relied on a photograph showing three orange traffic control panels on the side of the road near a drop inlet grate to show that TxDOT attempted to warn of the dangerous condition or make it safe. In response, a TxDOT engineer opined that the panels were used by maintenance crews to divert traffic to another lane in the event of a flood, not to warn pedestrians of the grate.

The appeals court agreed with TxDOT finding that there was no evidence that TxDOT had actual knowledge of the alleged danger posed by the drop inlet grate; the devices were placed in that location to warn about the grate or make it safe; and TxDOT never received reports of prior injuries or the alleged dangerous condition. Because the court held that there was no evidence showing TxDOT had the actual knowledge required to waive its immunity under the TTCA, the court did not consider TxDOT's first issue. As such, the court concluded that the trial court lacked subject matter jurisdiction, reversed the trial court's judgment, and dismissed the case.

LAND USE

Eight Liners: *City of Fort Worth v. Rylie,* No. 18-1231, 2020 WL 2311941 (Tex. May 8, 2020). In this case, the Supreme Court of Texas determined the issue of constitutionality of eight-liners must be addressed in deciding the case. The court remanded the case to the Second Court of Appeals to address the issue.

In Texas, lotteries are unconstitutional with limited exceptions. Lotteries include activities that involve, at a minimum, (1) the payment of consideration (2) for a chance (3) to win a prize. There is a "fuzzy animal exception" to the prohibition on lotteries. A machine that would otherwise constitute a "gambling device" is excluded from the definition if (1) it is used "solely for bona fide amusement purposes," (2) it rewards only "noncash merchandise prizes, toys, or novelties, or a representation of value redeemable for those items," and (3) the reward for "a single play of the game or device" is worth no more than the lesser of $5 or ten times the cost of the single play. Tex. Penal Code § 47.01(4)(B).

Soon after the legislature adopted the fuzzy-animal exception, owners of machines known as "eight liners" began taking the position that their machines fall within the exclusion's protection. Eight liners generally operate like a video slot machine and award coupons based on play. The player can then exchange the coupon for a "prize" or for a "right of replay," meaning credits to use on a different machine.

The eight liner operators admit that their eight liners qualify as "gambling devices," but they contend that they operate their machines in a way that brings them within the fuzzy-animal exception. The city argued eight liners are unconstitutional lotteries and therefore not governed by Chapter 2153 because it does not apply to unconstitutional devices. The city did not contest that the operators' eight liners qualify as coin-operated machines, but instead contended that Chapter 2153 does not apply to them at all if they are unconstitutional or illegal.

The Supreme Court of Texas agreed the issue needed to be decided. The court determined the issues were: (1) whether the eight liners constitutionality and legality affect Chapter 2153's applicability, and if so, (2) whether eight liners are constitutional and legal. On the first point, the court concluded that constitutionality and legality matter because Chapter 2153 does not apply to or regulate unconstitutional or illegal machines. The operators argued that Section 2153.003 merely clarifies that, although Chapter 2153 applies to and regulates unconstitutional and illegal machines, it does not thereby make them constitutional or legal. TEX. OCC. CODE § 2153.003. As they construed it, although the state may license and tax machines, the Chapter does not provide a shield of legality to someone charged with operating an illegal machine. They argued their machines are not illegal because the state licenses their machines under Chapter 2153.

The city contended the eight liners are unconstitutional or illegal, therefore, the fact that the state has licensed and taxed them would not change the meaning of Section 2153.003 any more than it could change the meaning of the constitution's requirement that the legislature prohibit lotteries. The court found that this issue needed to be addressed. If the legislature exercises power the constitution says it doesn't have—that is, if it permits lotteries when it only has the power to prohibit them—the court takes the constitution's word over that of the legislature. It concluded Chapter 2153 does not apply to unconstitutional or illegal machines.

The Court did not address the second issue of whether or not eight liners are unconstitutional. Instead, it remanded the issue to the Second Court of Appeals to decide in the first instance.

Land Use: ***City of Dallas v. 6101 Mockingbird, LLC*****, No. 05-18-00328-CV, 2019 WL 3296976 (Tex. App.—Dallas July 23, 2019) (mem. op.)**. This case arises from an appeal of the trial court's order denying the City of Dallas' partial plea to the jurisdiction in a land use claim.

Mockingbird, LLC (Mockingbird) purchased two adjoining properties located at the northeast corner of Skillman Avenue and Mockingbird Lane (Property), in which a gas station was located. The Property was zoned commercial retail, which required a minimum front-yard setback of 15 feet, measured from the edge of a dedicated roadway or highway. Mockingbird planned on developing the Property for medical services and filed a plat application with the city to create two lots to allow for commercial use other than a gas station. The city approved the plat conditionally, providing that final approval required compliance with certain conditions, including a dedication to the city, in fee simple, of a 10-foot strip of land along Mockingbird Lane in furtherance of the city's thoroughfare plan. Mockingbird notified the city that it believed the required dedication was an illegal taking and requested that the city perform a rough proportionality analysis pursuant to Section 212.904 of the Local Government Code. The city declined to offer compensation for the required dedication after a city engineer determined that the required dedication was roughly proportional to the impact of the proposed development project. Mockingbird made the dedication in protest but appealed the rough proportionality determination to the city's planning commission claiming the strip of land was valued at $327,603. The planning commission concluded that Mockingbird had failed to meet its burden of proof to overturn the city engineer's finding. Mockingbird then appealed to the city council, which affirmed the planning commission's decision. As a result, Mockingbird filed suit in county court alleging violations of Section 212.904 and substantive and procedural due-process rights. Mockingbird also alleged that although the city's setback requirement was not in and of itself an exaction, as applied, in combination with the required dedication, resulted in an exaction. The city filed a partial plea to the jurisdiction challenging the trial court's subject-matter jurisdiction. The trial court granted the plea as to Mockingbird's declaratory judgement claim and denied the city's plea as to Mockingbird's remaining claims. The city appealed.

The court of appeals determined that because Mockingbird did not assert a free-standing takings claim as to the setback requirement, the setback requirement may factor into the just compensation prong of its takings claim concerning the dedication.

The court then considered the city's claim that Mockingbird could not immediately complain about the setback impact because it did not present its complaints about the setback through the Section 212.904 process prior to bringing suit. The court concluded that it did not need to determine whether a complaint about a zoning requirement is a dedication because the setback requirement potentially relates to the just compensation prong of Mockingbird's dedication takings claim. The court also held that the fact that the city did not condition approval of Mockingbird's plat on the setback placement does not preclude a claim for the exaction of the 10-foot right-of-way and possibly the consideration of the application of the setback requirement in determining the extent of Mockingbird's damages. Accordingly, the court upheld the trial court's judgement with a modification to delete the trial court's references to setback regulations

because Mockingbird clarified that its reference to the setback requirement related to damages it claimed as a result of the required dedication.

Land Use: ***Starbright Car Wash LLC v. City of Belton*****, No. 14-18-00261-CV, 2019 WL 6711398 (Tex. App.—Houston [14th Dist.] Dec. 10, 2019) (mem. op.)**. In May 2005, the City of Belton adopted an ordinance approving a developer's proposed change to a retail zoning district, which also indicated that the city would extend one particular road. Five years later, in November 2010, the city approved a revised plat that did not include the extension of the road. In December 2010, Starbright purchased the proposed car wash site. In May 2012, the plat was recorded without the extension of the road and the additional access point to the car wash site. Starbright sued the city, arguing that the city's approval of the revised plat constituted a taking of its protected right in access to its property. The city filed a motion for summary judgment, which was granted by the trial court. Starbright appealed.

On appeal, Starbright argues that the city's 2005 ordinance created a constitutionally protected property interest in access from the extended road. The court held that property owners do not acquire a constitutionally protected vested right in zoning classifications because the city retains its legislative authority to rezone at any time as public necessity demands. Further, Starbright didn't purchase its property until after the city decided not to extend the road. Consequently, Starbright did not establish that it relied upon the city's original plan to extend the road differently from any property owner's reliance on more conventional zoning classifications. The filing for the revised plat did not constitute a taking; the court affirmed the trial court's judgment.

Land Use: ***City of Houston v. Commons at Lake Houston, Ltd.*****, No. 14-18-00664-CV, 2019 WL 5158725 (Tex. App.—Houston [14th Dist.] Oct. 15, 2019).** The Commons at Lake Houston, Ltd. (Commons) began development of a master-planned community called "The Crossing" that contained portions located in the 100-year and 500-year floodplains. Following Hurricane Harvey, the city adopted an ordinance imposing new restrictions on building within the floodplain. The Commons sued the city before the effective date of the ordinance, asserting claims for inverse condemnation and a declaratory judgment. After the suit was filed, an individual working on the development project emailed a city engineer asking about the application of the vested rights statute. The city engineer responded by stating that some of the proposed improvements are not part of the plat and therefore would not be vested. The city filed a plea to the jurisdiction arguing that The Commons' claims were not ripe because the city had not made a final decision applying its floodplain regulations to the development. The Commons responded by using the emails between the developer and the city engineer as evidence that a decision had been made by the city. The trial court denied the city's plea to the jurisdiction and the city appealed.

On appeal, the city contends that The Commons' claims were not ripe, since the city has not made any final decision applying the ordinance to deny a permit application for The Commons' property or decided whether the ordinance applied to The Crossing. First, the court held that the inverse condemnation claim was not ripe, as it was undisputed that The Commons did not have any permit or plat applications denied as a result of the amended ordinance. The Commons claimed that its inverse condemnation claim was ripe upon enactment because the ordinance

prohibits the precise use intended for the property. However, the court points out that the ordinance allows for variances. Nothing in the ordinance prevents The Commons from seeking a variance from the ordinance. Because The Commons had not given the city the ability to exercise its discretion, the inverse condemnation claim was not yet ripe.

Similarly, the court held that The Commons' vested rights claim also was not ripe. The Commons argued that the email exchange with the city engineer shows that the city had finally decided that Chapter 245 of the Local Government Code was inapplicable. The court held that the email exchange did not constitute "official action" by the city. The Commons asked a general question about unspecified tracts of land, and the city employee, after specifying that she was not an attorney, gave a general answer. This did not constitute evidence that the city made a final decision to apply the new ordinance to the developed property, and the Chapter 245 claim was not ripe.

The trial court erred because The Common's inverse condemnation and vested rights claims were not ripe. The court sustained the city's issue, reversed the trial court's order, and rendered a judgment that The Commons' claims were dismissed without prejudice.

Land Use: ***Town of Flower Mound v. Eagleridge Operating, LLC*****, No. 02-18-00392-CV, 2019 WL 3955197 (Tex. App.—Fort Worth Aug. 22, 2019) (mem. op.).** This is an interlocutory appeal in a temporary injunction case where the Fort Worth Court of Appeals held the zoning restriction on oil and gas equipment at issue was a penal ordinance and no vested property right existed, depriving the trial court of jurisdiction to issue a temporary injunction.

Plaintiff took over operation of a series of oil/gas wells in the Town of Flower Mound. The town passed an ordinance regulating operations, the removal of wastewater, and hours of operation. The ordinance stated as part of its purpose that natural gas drilling and production operations involve or otherwise impact the town's environment, infrastructure, and related public health, welfare, and safety matters. In 2018, plaintiff filed three actions with the board of adjustment (BOA) and board of oil and gas appeals (OGA) regarding variances, which were denied. The town issued several criminal citations for after-hour operations and failure to remove wastewater. Plaintiff sought a temporary restraining order (TRO) and injunction to prevent the enforcement of the ordinance, which was granted. The town, BOA and OGA appealed.

The basic test as to whether a law is penal is whether the wrong sought to be redressed is a wrong to the public or a wrong to an individual. A public wrong involves the "violation of public rights and duties, which affect the whole community, considered as a community, and are considered crimes; whereas individual wrongs are infringements of private or civil rights belonging to individuals, considered as individuals, and constitute civil injuries." When an ordinance's primary purpose is to protect the welfare of a city's citizens, it "is clearly addressing a wrong to the public at large and is a penal ordinance." The court held the zoning ordinance was penal in nature. To be entitled to injunctive relief, the plaintiff had the burden to demonstrate irreparable injury to a vested property right. Contrary to plaintiff's position, allegations of injury to an interest in real property does not equate to irreparable injury of a vested property right. Increases in operating costs does not equate to irreparable harm to their mineral interests. Loss of

profitability, alone, also does not equate to irreparable harm to their mineral interest. As a result, plaintiff is not entitled to injunctive relief to prevent enforcement of such a penal ordinance. Under sections of Texas Local Government Code Chapter 211 (dealing with BOA and appeals), no injunction is textually available for an appeal from the BOA to a district court, an appeal is only available from an official to the BOA. The legislature made a distinction between a restraining order and an injunction, and no injunctive relief is available under Chapter 211 for an appeal to district court from a BOA decision.

Chief Justice Sudderth concurred in a majority of the opinion but dissented as to the interpretation under Chapter 211. She opined a temporary restraining order is a stopgap, place-holding measure to preserve the status quo 14 days until a litigant's application for temporary injunction can be heard. For practical purposes, depriving the trial court of the ability to extend the restrained enforcement makes little sense.

Land Use: ***Reagan Nat'l Advert. of Austin, Inc. v. City of Austin*****, No. 03-18-00617-CV, 2019 WL 3756485 (Tex. App.—Austin Aug. 9, 2019) (mem. op.)**. This case arises from a second appeal filed by Reagan National Advertising of Austin Inc. (Reagan) regarding a billboard assessment charged by the City of Austin.

In 2010, Reagan, the owner and operator of billboards in the Austin area, sued the city in federal court challenging the constitutionality of billboard assessments charged by the city and paid by Reagan (in protest) from 2009-2014. After the federal court dismissed the suit for lack of jurisdiction, Reagan brought suit against the city in trial court. The trial court ordered that Reagan take nothing on its claims. Reagan filed its appeal, challenging the constitutionality of the assessment and seeking a refund of $198,450 and attorney's fees. Reagan did not seek injunctive relief. In October 2017, the court of appeals held that the billboard assessment was a tax that violated the Texas Constitution, ordered that Reagan recover $198,450 from the city, and remanded the case to the trial court to determine the appropriate amount of attorney's fees. The Supreme Court of Texas denied the city's petition for review, and the United States Supreme Court denied the city's writ of certiorari.

On remand, Reagan asserted that the city had sent it a notice on November 2017, attempting to collect a billboard assessment for the year 2018 at the same rate that the court of appeals had recently held to be unconstitutional. Reagan asked the trial court to prohibit the city from collecting the 2018 assessment. The court denied Reagan's request. Reagan then filed another motion in trial court requesting that the court render judgement awarding Reagan a refund of the total amounts it paid to the city for the years 2010-2018, enjoin the city from continuing to charge the unconstitutional tax, and award Reagan attorney's fees. While that motion was pending, Reagan filed a motion for enforcement of mandate, or in the alternative, for clarification with the court of appeals. The court of appeals denied the motion. The trial court then signed a final judgment, after remand, awarding Reagan $198,450 in damages, $303,907 in attorney's fees, and interest, and conditional appellate attorney's fees. The court denied Reagan's request for a refund for the additional years and Reagan's request for an injunction to enjoin the city from continuing to charge the billboard assessment, concluding that such additional relief was outside the scope of the court's authority. Reagan appealed.

The court of appeals concluded that it was beyond the scope of the trial court's authority on remand to award an additional refund to Reagan. Additionally, because Reagan did not seek injunctive relief, the trial court had no authority on remand to reopen the record to consider an injunction. Accordingly, the court affirmed the trial court's judgement.

Short Term Rentals: *Zaatari v. City of Austin*, No. 03-17-00812-CV, 2019 WL 6336186 (Tex. App.—Austin Nov. 27, 2019). This is an appeal arising from a challenge to the City of Austin's ordinance regulating short-term rental properties (STRs).

A number of property owners challenged certain provisions of the city's ordinance as unconstitutional. Specifically, they challenged a provision that suspended the licensing of any new use of non-owner-occupied single-family residences as short-term rental properties (type-2 STRs) and terminated all type-2 STRs by 2022. They also challenged an ordinance provision that controls the conduct and types of assembly at short-term rental properties, including prohibiting any assemblies between the hours of 10:00 p.m. and 7:00 a.m., prohibiting outdoor assemblies of more than six adults between 7:00 a.m. and 10:00 p.m., and prohibiting more than six unrelated adults or ten related adults from being present on the property at any time. The State of Texas intervened in the property owners' suit asserting that the ordinances' ban on short-term rentals of non-homestead properties is unconstitutional as a retroactive law and as an uncompensated taking of private property. The trial court granted the city's no-evidence motion for summary judgement, denied the property owners' and the State's traditional motions for summary judgement, excluded certain evidence from the summary-judgement record, and overruled the city's plea to the jurisdiction. The property owners and the State appealed, and the city cross-appealed.

In striking down the city's ban of type-2 STRs, the court held that the provision is unconstitutionally retroactive because it would significantly impact property owners' well-settled right to lease their property while serving minimal, if any, public interest. The court relied on a 2018 Supreme Court of Texas opinion relating to homeowners' associations' limits on STRs to hold that short-term rentals are residential, rather than commercial, in nature. The court also concluded that the ordinance provision restricting assembly infringes on Texans' fundamental right to assemble because it limits peaceable assembly on private property. The court determined that this provision is not narrowly tailored to serve a compelling state interest, thus, it violates the Texas Constitutions' guarantee to due process.

Land Use: *City of Houston v. Texas Propane Gas Ass'n*, No. 03-18-00596-CV, 2019 WL 3227530 (Tex. App.—Austin July 18, 2019) (mem. op.). This is an interlocutory appeal of the trial court's order denying the City of Houston's motion for summary judgement over claims for declaratory relief made by Texas Propane Gas Association (TPGA).

In 2015, the City adopted several ordinances and regulations that had the effect of placing new restrictions on the ability to store, use, handle, or dispense LP-Gas within the city. TPGA sued the city asserting that the ordinances imposed more restrictive conditions on the LP-Gas industry than those imposed by the Railroad Commission's LP-Gas Safety Rules, adopted pursuant to Chapter 113 of the Texas Natural Resources Code. TPGA sought a declaratory judgement that

the ordinances and regulations were invalid because they were preempted by state law and the LP-Gas Safety Rules. In the alternative, TPGA sought declarations that certain portions of the city's regulations relating to fees and permits, aggregate water capacity of LP-Gas containers, required submission of applications and construction documents, and maximum storage capacity were preempted. TPGA filed a traditional motion for summary judgement on its claims, and the city responded with a motion for summary judgement for lack of jurisdiction and a traditional motion for partial summary judgement. The trial court denied the competing motions, and the city filed an interlocutory appeal on its jurisdictional challenge.

The court of appeals first looked at whether TPGA had standing to sue. The court concluded that it did not. The court determined that, although TPGA had met the first prong of the associational standing test by showing that at least one of its members had already been assessed fees for a permit that was required by the ordinances but not the LP-Gas Safety Rules, TPGA had failed to explain how any TPGA member, as opposed to a TPGA member's customer, had suffered an injury fairly traceable to enforcement of alleged invalid regulations on LP-Gas. Because TPGA's challenge to the city's ordinances was not limited to permitting requirements but to all LP-Gas regulations promulgated by the city, the court concluded that TPGA had failed to meet the second prong of the test, which requires a demonstration that at least one of its members has suffered a particularized injury, distinct from the general public, that is fairly traceable to each of the city's regulations relating to the LP-Gas industry that the declaration will redress. The court then addressed whether a civil trial court had the jurisdiction to determine the validity of ordinances and regulations that were penal in nature. The court concluded that TPGA's suit to declare certain regulations invalid may be brought in civil court because there is a threat of irreparable injury to vested property rights.

Accordingly, the court concluded that the trial court erred in denying the city's motion for summary judgement and remanded the case so that TPGA may have a reasonable opportunity to amend its pleadings, if possible, to demonstrate that it has standing to bring suit for declaratory relief.

Junked Vehicles: *Tucker v. City of Corpus Christi*, No 13-18-00328-CV, 2020 WL 948364 (Tex. App.—Corpus Christi Feb. 27, 2020). On August 5, 2013, a municipal court judge ordered the seizure of four vehicles located on property owned by Danis and Beverly Tucker. The Tuckers contended that the vehicles were antique cars that were not subject to seizure under the city's junked vehicle ordinance. Their initial suit against the city was dismissed on August 5, 2015, for want of prosecution. The Tuckers filed another lawsuit on August 4, 2017, alleging conversion, trespassing, invasion of privacy, due process violations, fraudulent misrepresentation of the city's code of ordinances, and the taking of personal property without just compensation. The city filed a plea to the jurisdiction contending that the Tuckers' claims were barred by the two-year statute of limitations in Civil Practice and Remedies Code Section 16.003. The trial court granted the city's plea to the jurisdiction and the Tuckers appealed.

In their sole issue on appeal, the Tuckers argued that the trial court erred in dismissing their takings claim because their suit was filed within the applicable limitations period. The court of appeals first, in reliance on the Supreme Court of Texas's decision in *Prairie View A&M v.*

Chatha, 381 S.W.3d 500 (Tex. 2012), concluded that the statute of limitations is a jurisdictional requirement in suits brought against a governmental defendant. The Tuckers argued that their takings claim is governed by a ten-year statute of limitations, instead of two years. The court noted that the ten-year statute of limitations cited by the Tuckers applies to a governmental entity's taking of real property, not personal property like the automobiles at issue. Under Civil Practice and Remedies Code Section 16.003, the applicable statute of limitations was two years. Further, the court held that the Tuckers' initial lawsuit, which was dismissed for want of prosecution, did not toll the limitations period.

Because the Tuckers' lawsuit was filed on August 4, 2017, almost four years after the alleged taking and well beyond the two-year statute of limitations, the court concluded that the Tuckers failed to comply with a statutory prerequisite to suit, thus negating jurisdiction. The court of appeals affirmed the trial court's granting of the city's plea to the jurisdiction.

Land Use: *Comanche Peak Ranch, LLC v. City of Granbury*, No. 02-19-00412-CV, 2020 WL 1949628 (Tex. App.—Fort Worth Apr. 23, 2020) (mem. op.). In this annexation case the appellate court affirmed that the proper vehicle for challenging the city's annexation was a quo warranto proceeding because it is the proper way to challenge procedural faults with annexation.

The city initiated the process to annex the plaintiff's property prior to the effective date in H.B. 347, passed during the 2019 legislative session. The city sent the property owners proposals for "development agreements" for their agriculture-exempt properties that would postpone annexation if the property owners signed the agreements. The property owners dispute that the proposals met the requirements of the annexation statutes and that the failure to meet those standards render the annexation void.

The property owners filed suit challenging the annexation. The city filed a plea to the jurisdiction, which the trial court granted. The appellate court only addressed whether a quo warranto proceeding was the proper vehicle to challenge the annexation because that disposes of all issues.

Generally, the only appropriate mechanism for challenging the validity of an annexation is a quo warranto proceeding, in which the State of Texas acts to protect itself and the good of the public generally, through the duly chosen agents of the state who have full control of the proceeding. The purpose of a quo warranto proceeding is to question the right of a person or corporation, including a municipality, to exercise a public franchise or office. The attorney general or a district or county attorney brings quo warranto proceedings in the name of the State of Texas. They serve the purpose of avoiding numerous successive suits by private parties attacking the validity of annexations, which could lead to different results.

A quo warranto proceeding is the proper way to challenge procedural faults such as the adequacy of a service plan, lack of notice, lack of a quorum for hearing, and other deficiencies in the procedure of adopting the annexation ordinance. The determination of whether an individual landowner, as opposed to the state in a quo warranto proceeding, has standing to challenge annexation turns on whether the challenge attacks a city's authority to annex the area or merely complains of a violation of statutory procedure. The issue is whether the property owners' claims

are based on a procedural defect in the annexation, or the city's exceeding its annexation authority as delegated by the legislature.

The property owners specifically complain that the development agreement did not: (1) guarantee the continuation of ETJ status and exemption from annexation; and (2) contain a property description. Regarding the continuation of ETJ status, the property owners complain the development agreement did not meet the requirement of Local Government Code Section 43.016(b) that has the language "may not annex . . . unless." However, the property owners confused being offered a development agreement with acceptance of the agreement. The property owners and the city did not reach an agreement; therefore, the adequacy of the development agreement is a defect in the procedure and must be brought in a quo warranto proceeding.

Likewise, the property owners' complaint regarding the insufficient property description is a defect in procedure. The law only requires an adequate legal description. The description the city used is the one it received from the properties' taxing entity, which meets that requirement.

Because the property owners did not accept the proposal and the parties never entered into a final agreement, all of the property owners' complaints are just about the procedure. Complaints about procedure must be brought in a quo warranto proceeding. Therefore, the appellate court affirmed the dismissal but modified the judgment to reflect that the dismissal is without prejudice to allow the claims to be brought in a quo warranto proceeding.

Short Term Rentals: *Anding v. City of Austin*, No. 03-18-00307-CV, 2020 WL 2048255 (Tex. App.—Austin Apr. 29, 2020) (mem. op.). This is a case challenging the constitutionality of the City of Austin's short-term rental (STR) regulations where the court of appeals affirmed summary judgement in favor of the city and reversed the plea to the jurisdiction as it applied to the municipal court judge.

Robert and Roberta Anding own a vacation house in the City of Austin that they rent out to others when they are not using the property. In an effort to avoid the city's STR ordinance, which applies to short-term rentals of periods of less than 30 consecutive days, the Andings entered into 30-day leases with multiple, unrelated lessees, who in turn entered into co-tenant agreements amongst themselves to grant to each other, in return for a reduction in the total lease cost, the right to exclusively occupy or use the house for portions of the 30-day term. The co-tenant agreement specified that the Andings were not parties to the co-tenant agreement.

In response to a complaint by a nearby homeowner, the city's code enforcement interviewed the occupants of the Andings' house, and, based on that information, issued the Andings with four administrative citations for operating without an STR license and violating the STR ordinance. The Andings paid the fines but challenged their validity in an administrative hearing process. The hearings officer upheld the fines, and the Andings appealed to city's municipal court. Judge Clervi affirmed the hearing officer's decision and denied the Andings' motion for a new trial. The Andings filed suit against the city seeking declaratory and injunctive relief related to the city's citations, asserting that the STR ordinance was unconstitutionally vague as it did not give fair notice that a lease violates the ordinance if some, any, or all of the tenants do not actually

stay at the home for a continuous 30 days or if the tenants share the rent and periods of possession. They also sought mandamus relief to compel Judge Clervi to apply the law correctly. The Andings and the city filed cross motions for summary judgment on the Andings' constitutional claim, and Judge Clervi filed a plea to the jurisdiction challenging the request for mandamus relief. The district court denied the Andings' motion for summary judgement, granted the city's motion for summary judgement, and sustained Judge Clervi's plea to the jurisdiction. The Andings' appealed.

On appeal, the court found that the trial court had jurisdiction over the Andings' constitutional claim because the UDJA waives immunity for claims alleging that an ordinance is unconstitutional. However, the court determined that the STR ordinance gave fair notice of what conduct was subject to the ordinance. Applying the common and ordinary meaning of "rent" and "rental" and incorporating the city's code definition of "short-term rental use," the court concluded that the city's STR ordinance applied to the paid-for grant of occupancy or use of a residential dwelling for less than 30 consecutive days. Additionally, the court held that the city is not required to expressly list every fact pattern that would not be subject to the STR ordinance, and not doing so does not make the ordinance vague and does not invite the city to expand the scope of the ordinance beyond its plain language. Accordingly, the court denied the Andings' motion for summary judgement and upheld the city's motion for summary.

With respect to the mandamus claim, the court found that the trial court erred in sustaining Judge Clervi's plea to the jurisdiction because the court had jurisdiction over the request for mandamus relief. The court remanded the claim to the trial court for further proceedings on whether the Judge's actions were ministerial.

Land Use: ***Oak Point Bd. of Adjustment v. Houle*****, No. 02-19-00068-CV, 2019 WL 6767801 (Tex. App.—Fort Worth Dec. 12, 2019) (mem. op.)**. This is a board of adjustment appeal where the Fort Worth Court of Appeals reversed the denial of the board's plea to the jurisdiction and dismissed the case.

The City of Oak Point has a zoning ordinance establishing a 50-foot front-yard setback in residential neighborhoods. Houle, a resident, complained about the variance to the set-back granted to his neighbor, Bobby Pope. Pope received a permit and built a shed, but due to a miscalculation, it was built in the setback. The board of adjustment (BOA) granted the variance. Houle attempted to challenge it by suit in the county court at law. The BOA filed a plea to the jurisdiction which was denied. It appealed.

The BOA advised Pope had since moved the shed out of the setback. By variance, the BOA effectively excepted Pope's shed from the front-yard setback requirement. Houle's petition seeks to undo that exception. However, the variance expressly stated that should the shed ever be moved, the variance would be nullified, which is exactly the relief requested by Houle. The shed's relocation means that Houle has obtained the relief he sought by his claims, and a judicial determination cannot have any practical legal effect on an existing controversy, rendering his lawsuit moot. None of Houle's arguments asserting why the suit remains live applied. As a result, the plea should have been granted.

Land Use: ***Powell v. City of Houston*****, No. 01-18-00237-CV, 2019 WL 2588104 (Tex. App.—Houston [1st Dist.] June 25, 2019).** In this case, the First Court of Appeals affirmed the lower court's holding that the City of Houston's use of historical districts does not constitute zoning.

Houston's charter provides that zoning ordinances can only be adopted after a six-month hearing and debate period and a binding referendum at an election. In 1995, the city council adopted the Historical Preservation Ordinance (HPO) which allowed for areas to be designated as historical districts. Once a historic district is created, a landowner has to apply to the city council for a certificate of appropriateness when "demolishing, modifying, or developing property" located with the district. In 2010, Houston amended the HPO to allow for a reconsideration process to be initiated by 10% of the owners in a historic district to challenge the historical designation. A group of homeowners in one of these historic districts initiated a reconsideration process which ultimately failed to change the historical designation of their district. These homeowners later brought suit against the city seeking a declaratory judgment that the HPO is void and unenforceable because it is a zoning or de facto zoning ordinance that violates the charter's prohibition of zoning ordinances.

Zoning ordinances are adopted in accordance with a comprehensive plan and used as a "tool of community planning, allowing a municipality, in the exercise of its legislative discretion, to restrict the use of private property." Houston argued that the HPO was not a zoning ordinance because it was not adopted as part of a comprehensive plan and the restrictions are on the modification and preservation of the property and not on how property can be used. The homeowners argued that either the HPO itself or Houston's "general plan" was a comprehensive plan and that the use of the property was regulated and, therefore, the HPO should be considered a zoning ordinance. The First Court of Appeals concluded that none of the documents that the homeowners point to constitute a comprehensive plan because the HPO is meant to preserve an area and does not contain language implementing a comprehensive plan for community development and the general plan does not contain zoning ordinances. Further, the court found that the HPO is not a zoning ordinance because it regulates the style and aesthetic of historical buildings but not what uses, or classes of buildings may exist in an area. While historical preservation districts can be part of a comprehensive zoning plan, there is no restriction on these districts being created through other non-zoning means.

Land Use: ***Jacks v. Zoning Bd. of Adjustment of City of Bryan*****, No. 07-18-00174-CV, 2019 WL 2998807 (Tex. App.—Amarillo July 9, 2019) (mem. op.)**. Jon Jacks (Jacks) purchased a piece of property in a residential subdivision with the intent of building a commercial laundromat on the land. Because the original plan for the subdivision had been filed with the City of Bryan in 1960, Jacks contended that he possessed vested rights under Chapter 245 of the Texas Local Government Code that requires that only those zoning laws and regulations that were in effect in 1960 apply to Jacks' property. When the city denied Jacks' application for a permit, Jacks appealed to the Zoning Board of Adjustment (board). The board denied Jacks' request because he failed to identify any specific regulation that had changed since 1960 that affected the development of his property and he failed to identify any permit application that he had submitted to the board that had been denied. Jacks appealed the board's decision to the district

court. Jacks and the board both filed motions of summary judgment asserting both traditional and no-evidence grounds. After holding a hearing, the trial court granted the board's motion and Jacks filed this appeal with five issues.

The court overruled all of Jacks' issues and affirmed the trial court's judgement. The court combined Jacks' first and fourth issue. Jacks contended that the trial court erred when it failed to find that Jacks possessed vested rights in the property pursuant the Chapter 245 of the Texas Local Government Code. Conducting a *de novo* review, the court first reviewed whether the trial court properly applied the no-evidence standard for the motion of summary judgment. The motion for a no-evidence summary is required to be granted if the nonmovant fails to produce summary judgment evidence that raises a genuine issue of material fact on the challenged elements. The court determined that Jacks had no evidence that he properly raised the issue of his vested rights by filing an application for a permit which is required by Chapter 245, and therefore it could not conclude that trial court erred in granting the board's no-evidence summary judgment or that the board improperly analyzed and applied chapter 245.

Next, the court reviewed Jacks' second and third issues together. Jacks stated the trial court erred when it considered evidence on appeal that was not presented to the board prior to its decision to deny Jacks' vested property rights and that the trial court considered defective affidavits as proper summary judgment evidence. The only evidence Jacks said the trial court considered that the board was not presented with were the defective affidavits. The court determined that since Section 211.011 of the Texas Local Government Code does allow the trial court to receive additional evidence that was not part of the record before a board of adjustment the trial court did not err in considering the two affidavits. This is especially the case since Jacks did not obtain any ruling on any evidentiary objection he raised at either the trial court nor with the board and he made no effort in establishing how he was harmed by the trial court's consideration of those affidavits.

Lastly, Jacks fifth issue contends that the trial court erred in denying his no-evidence summary judgment since the board did not respond to his motion with necessary evidence to defeat his motion. Though Jacks' no-evidence motion of summary judgment only challenged the propriety of the board's affirmative offense, which is all that could have been challenged, the trial court still had to determine whether Jacks had asserted a proper claim for vested rights. Since the Court had already determined that he had not properly asserted his vested right claim, the fifth issue was immaterial.

OPEN GOVERNMENT

Open Government: *City of Plano v. Hatch*, No. 05-18-00927-CV, 2019 WL 4010777 (Tex. App.—Dallas Aug. 26, 2019). This is an interlocutory appeal of the trial court's order denying the City of Plano's plea to the jurisdiction in an action alleging a violation of the Texas Open Meetings Act (TOMA).

The Hatches sued the city after city council voted to rename and expand the city's non-discrimination policy, alleging that: (1) although the vote occurred at a public meeting, council actually held deliberations and voted on the ordinance in prior closed meetings in violation of the

TOMA; (2) the city surveyed councilmembers for their policy positions, establishing a "walking quorum;" (3) the city failed to maintain an adequate certified agenda; and (4) the city's public notice was "deliberately dishonest" about the fact that the ordinance was new. The Hatches sought a declaration that the ordinance is void; the city's actions violated the Hatches' rights and the rights of the city's citizens and Texas law; and a declaration preventing the city from simply "reenacting" the ordinance.

The City filed a plea to the jurisdiction alleging that: (1) only a writ of mandamus or injunction, and not declaratory relief, is available under TOMA; (2) TOMA requires the Hatches sue the individual councilmembers, not the city; (3) the Hatches improperly "attempt to block" the city's legislative right to pass future ordinances; (4) there is no waiver of the city's immunity for the Hatches' claims that the city violated criminal statutes; (5) the Hatches' claims are moot, because only one of the members of the council who allegedly violated TOMA is still serving on the council; (6) because the city posted and conducted a public meeting where the ordinance was passed, any prior alleged TOMA violations are moot and "barred by ratification"; and (7) the Hatches claims against the city manager are improper because he is not a member of the city council. The Hatches responded by filing a supplemental petition adding an allegation that the city's immunity was waived under TOMA, and pleaded additional causes of action for declaratory judgement, injunction, and mandamus. The court denied the city's plea to the jurisdiction. The city appealed.

The court of appeals first considered whether TOMA's waiver of immunity under Section 551.142 (permits suits "to stop, prevent, or reverse a violation or threatened violation . . . by members of a governmental body") and Section 551.141 ("[a]n action taken by a governmental body in violation of this chapter is voidable.") applies to cities. The court concluded that a city is a "governmental body" under which an action can be brought under Section 551.142 of the TOMA.

The court then considered whether TOMA or the Uniform Declaratory Judgement Act (UDJA) waive immunity for declaratory relief. Reading Sections 551.141 and 551.142 together, the court concluded that, in addition to requests for mandamus and injunctive relief, TOMA waives immunity for a request to declare void an action taken in violation of TOMA. The court determined that the trial court did not have jurisdiction over the Hatches' remaining requests for declaratory relief. The court also found that the subsequent ratification of the Ordinance did not deprive the trial court of jurisdiction over the Hatches' complaints about the city's actions. Accordingly, the court reversed the portion of the trial court's order denying the plea as to the Hatches' claims for declaratory relief other than their request to declare the ordinance void and affirmed the remainder of trial court's order.

Open Government: ***City of Austin v. Lake Austin Collective, Inc.*****, No. 14-18-00068-CV, 2019 WL 6317337 (Tex. App.—Houston [14th Dist.] Nov. 26, 2019) (mem. op.)**. The City of Austin's posted agenda for a November 10, 2016, meeting gave notice of the approval of an ordinance authorizing the execution of an amendment to a settlement agreement relating to the development of a specific property in the city. The ordinance was subsequently adopted and included language in the ordinance and ordinance's caption indicating that certain sections of

city code and Lake Austin Watershed regulations were waived with regard to the property in question. Lake Austin Collective, Inc. filed suit alleging that the agenda item violated the Open Meetings Act (Act) by failing to provide proper notice of the subjects of the meeting since it did not make any mention of the waiver of city code or the watershed regulations. The trial court signed a final judgment in favor of Lake Austin Collective and the city appealed.

The issue on appeal was whether the city's notice was sufficient. The court compared the content of the notice with the action taken at the meeting to determine if there was substantial compliance with the Act's requirement to provide notice of the subject of a meeting. Finding that the city's notice was fatally flawed, the court determined that the reader of the agenda would have lacked any notion that waiver of provisions of the city code or the watershed regulations were to be addressed by the council. Therefore, the agenda item fell short of the full disclosure required for substantial compliance with the Act. The court affirmed the judgment of the trial court.

Open Government: ***TOMA Integrity, Inc. v. Windermere Oaks Water Supply Corp*****., No. 06-19-00005-CV, 2019 WL 2553300 (Tex. App.—Texarkana June 21, 2019) (mem. op.)**. In this Texas Open Meetings Act (Act) case, the Sixth District Court of Appeals affirmed the lower court's decision to not invalidate an action taken after a violation of the Act because the challenge was not immediate.

The Windermere Oaks Water Supply Co. (Windermere) held a meeting relating to the sale of a portion of their property to another party but failed to include an agenda item describing the action on their meeting notice. After Windermere completed the sale of the property, TOMA Integrity, Inc. sought to void the sale of the property because of the violation of the Act.

The court held that while a violation of the Act had occurred, the action taken was voidable but not void. Instead of seeking immediate relief after the violation of the Act, TOMA Integrity, Inc. waited until the sale had already occurred. Because the sale had already taken place the case was now moot and the court upheld the lower court's decision to not invalidate the action.

Open Government: ***Paxton v. Escamilla*****, No. 03-18-00346-CV, 2019 WL 5779912 (Tex. App.—Austin Nov. 6, 2019).** This is an appeal of the trial court's order finding that Escamilla, the Travis County Attorney, is not required to disclose deferred prosecution agreement (DPA) records due to exceptions to disclosure under the Texas Public Information Act (Act).

The county attorney received a request under the Act for each DPA that his office had executed in domestic violence cases since April 2015. The county attorney declined to release the records and sought an opinion from the Attorney General's Open Records Division. The county attorney asserted that the requested records were excepted from disclosure. The attorney general issued a ruling concluding that DPAs whose terms had concluded could be withheld pursuant to the law enforcement exception, Section 552.108(a)(2) of the Government, but the DPAs whose terms had not concluded were not excepted from disclosure and must be released. The county attorney filed suit seeking declaratory relief from the attorney general's ruling. The trial court determined that all of the DPAs were excepted from disclosure, dividing them into three categories: (1) DPAs pertaining to dismissed criminal cases that have not been refiled are excepted from public

disclosure by Section 552.108(a)(2); (2) DPAs pertaining to dismissed criminal cases that have been refiled and then dismissed again are excepted from disclosure by Section 552.108(a)(2); and (3) DPAs pertaining to dismissed criminal cases that have been refiled and are still pending are excepted from disclosure by Sections 552.108(a)(1), 552.103, and 552.107. The attorney general appealed.

The court of appeals affirmed the trial court's judgment. The court found that a dismissal pursuant to a DPA, even if conditional until the term of the DPA has run, satisfies the requirement of Section 552.108(a)(2) as an investigation that has not resulted in conviction or deferred adjudication. Similarly, the court determined that the dismissal of criminal charges that were refiled after the execution of a DPA satisfies the requirement of an investigation that has not resulted in conviction or deferred adjudication pursuant to Section 552.108(a)(2). The court also concluded that pending criminal charges that were refiled after the execution of DPA for failure to comply with one or more conditions of the agreement satisfy the requirement of Section 552.108(a)(1), as the release of such DPA would interfere with detection, investigation, or prosecution of a crime.

Open Government: *Brown v. City of Austin*, No. 03-19-00035-CV, 2019 WL 4068559 (Tex. App.—Austin Aug. 29, 2019) (mem. op.). This is a writ of mandamus seeking to compel the City of Austin to produce two police reports pursuant to a request under the Texas Public Information Act (PIA).

Brown, an inmate at the Texas Department of Criminal Justice, filed a writ of mandamus in trial court after the city refused to produce two police reports in response to his PIA request. The city filed a motion to dismiss under Chapter 14 of the Civil Practices and Remedies Code, which permits courts to dismiss inmate claims that are frivolous, arguing that because Brown was an inmate, the city's compliance with his PIA request was purely discretionary. Additionally, the city argued that Brown did not meet the requirements that entitled him to mandamus relief. The trial court dismissed Brown's suit. Brown appealed.

The court of appeals concluded that the trial court did not abuse its discretion because a governmental body's duty to disclose information requested by an inmate is discretionary. Accordingly, the court affirmed the trial court's order.

Open Government: *San Jacinto River Auth. v. Paxton*, No. 03-18-00547-CV, 2019 WL 3952829 (Tex. App.—Austin Aug. 22, 2019) (mem. op.). This is an appeal of the trial court's order granting the Office of Texas Attorney General's (AG) plea to the jurisdiction in a case involving the Texas Public Information Act (PIA).

The San Jacinto River Authority (SJRA) received two separate PIA requests on September 18, 2017, asking for information on pre-release of water related to Hurricane Harvey. The SJRA determined that some information responsive to each request was excepted from disclosure and sought decisions from the AG. On November 8, 2018, the AG issued a decision on one of the requests determining that the information was not subject to disclosure. On December 17, 2017, the AG issued a decision on the other request determining that SJRA had failed to timely submit its request for a decision and that, therefore, the information must be disclosed. The SJRA

contended that it "deposited in the mail" each of its two requests for AG decisions on October 2, 2017. Believing that the AG had erred in its timeliness determination, SJRA's general counsel contacted the AG's office and spoke with a representative from its Open Records Division informing him that the PIA allows timeliness to be established by either the postmark or other proof establishing the request was timely mailed, and that another request for a decision mailed at the same time was deemed timely. The representative of the Open Records Division invited the SJRA to submit a request for reconsideration of the timeliness of its request for decision. SJRA did so on December 28, 2017, including an affidavit stating that it had deposited its request for a decision in the mail on October 2, 2017.

The AG responded on February 6, 2018, citing Section 552.301(f), Texas Government Code, which provides that a governmental body is prohibited from asking for a reconsideration of the attorney general's decision. On February 23, 2018, the SJRA filed a lawsuit seeking a declaration under the PIA and the Uniform Declaratory Judgement Act (UDJA) that it was not required to disclose the requested information. The AG filed a plea to the jurisdiction. The trial court granted the plea. SJRA appealed.

The court of appeals found that SJRA's petition was not filed timely because Section 552.324(b) of the Government Code refers to the date the governmental body receives the decision of the AG in determining that the requested information must be disclosed to the requestor, not the date of the post-decision correspondence informing the SJRA that it was prohibited from asking for a reconsideration. The court also determined that the UDJA claim did not confer jurisdiction on the trial court, and that the SJRA could not rely on an estoppel argument to confer jurisdiction on the trial court. Additionally, the court found that the SJRA's "compelling reason" argument to withhold disclosure of the requested documents was outside the jurisdiction of the trial court and the court of appeals. Accordingly, the court affirmed the trial court's order.

Open Government: *Chisholm Trail SUD Stakeholders Group v. The Chisholm Trail Special Util. Dist.*, No. 03-18-00566-CV, 2020 WL 1281254 (Tex. App.—Austin Mar. 18, 2020) (mem. op.). This is an appeal in an asset transfer and utility system consolidation case in which the court of appeals granted the appellees motion to dismiss this appeal as moot, set aside the trail court's order of final summary judgement, and dismissed the case for lack of jurisdiction.

Chisholm Trail SUD Stakeholders Group (Stakeholders Group) filed suit complaining that the Chisholm Trail Special Utility District (District) and its directors violated the Open Meetings Act (TOMA) rendering an asset transfer and utility system consolidation agreement between the District and the City of Georgetown void. The Stakeholders Group sought a declaratory judgement and injunction to enjoin and prevent the District and its directors from continuing to violate the TOMA. The trial court granted a final summary judgement dismissing, with prejudice, the Stakeholders Group's claims against the District, its directors, and the city (Appellees). The Stakeholders Group appealed. The Appellees filed a motion to dismiss the appeal as moot.

The court of appeals concluded that it did not have standing because the Stakeholders Group's claims were moot. The court determined that the District had been dissolved pursuant to state

law, which authorized the District, regardless of pending litigation, to vote to dissolve; the Public Utility Commission had entered a final order to transfer the District's certified water-service area to the city, and such order was not appealable; and the requested relief to enjoin the Appellees from future TOMA violations would have no effect because the District had been dissolved and has no directors. Accordingly, the court lacked jurisdiction over the appeal.

Open Government: *Horton v. Welch*, No. 12-19-00381-CV, 2020 WL 1697439 (Tex. App.—Tyler Apr. 8, 2020) (mem. op.). James Horton made two Public Information Act (TPIA) requests of Ron Welch, the mayor of Caney City, requesting, among other items, copies of all text messages and emails of all city council members from November 2015 to January 2019. Welch responded to the request after Horton paid the resulting fees. However, Welch did not ask any councilmembers whether they had text messages or emails responsive to the request. Horton filed a suit under the TPIA, asserting that Welch did not fully comply with his request, and asked the trial court to issue a writ of mandamus directing the city to fully comply. The trial court granted Welch's motion for summary judgment, and Horton appealed.

Horton's sole issue on appeal is that the trial court erred in granting summary judgment in favor of Welch because Welch admitted in his deposition testimony that he made no inquiry of councilmembers regarding text messages and emails, which raises a fact question regarding whether Welch and the city complied with his requests. The court held that Welch "labored under a basic misconception of the law." In this case, the city could not fulfill the requirements of the TPIA by producing only documents in its possession when its officials possess documents that are subject to disclosure. Because the city did not seek to obtain texts and personal emails from councilmembers that the city did not keep in the regular course of business, there was a genuine issue of material fact as to whether Welch fully complied with Horton's requests by providing all texts and emails written by councilmembers in connection with the transaction of official business of the city. The court reversed the trial court's judgment and remanded the case to the trial court for further proceedings.

Open Government: *Roane v. Paxton*, No. 14-18-00264-CV, 2020 WL 428861 (Tex. App.—Houston [14th Dist.] Jan. 28, 2020) (mem. op.). This is a Public Information Act (PIA) lawsuit where the Fourteenth Court of Appeals agreed with the attorney general that certain records must be released.

Roane served as superintendent of the Seguin Independent School District (District) who had a sexual harassment charge filed against him. After he had left the District, the District received several PIA requests which included information on the complaint. Roane was notified he could file a third-party objection, which he did asserting common law privacy to withhold the information. While the attorney general (AG) allowed the District to withhold other responsive information, it opined the complaint information was subject to release. Roane filed suit to prevent the release and filed a motion for summary judgment. The AG also filed a motion for summary judgment. The trial court granted the AG's motion and denied Roane's motion. Roane appealed.

The common-law right to privacy protects information from disclosure when "(1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public." However, the highly intimate or embarrassing facts must be "about a person's private affairs." The summary judgment record failed to demonstrate that the information involved matters relating to Roane's "private affairs." Matters of workplace harassment, discrimination, and policy violations in a governmental body, by their very nature, generally do not qualify. The court noted the complainant's name and other individuals' names have been redacted from the information ordered to be disclosed by the AG's opinion. As a result, all that remains are public matters. Therefore, the trial court ruled properly regarding the competing motions.

RED LIGHT CAMERAS

Red Light Cameras: *Van Der Grinten v. City of Sugarland*, No. 01-17-00626-CV, 2020 WL 2201100 (Tex. App.—Houston [1st Dist.] May 7, 2020) (mem. op.). In this constitutional challenge to red-light camera case, the First Court of Appeals held the plaintiffs were required to exhaust administrative remedies before bringing their constitutional takings claim.

The plaintiffs sued the City of Sugarland. Two of the plaintiffs had paid a civil penalty for violating a city ordinance for red-light infractions caught on camera. They claimed they paid under "duress." One of the plaintiffs did not pay the penalty but claimed the city would put a hold on his registration for failure to pay. The plaintiffs sought declaratory judgment, injunctive relief, and reimbursement for penalties. The city filed a plea to the jurisdiction, which the trial court granted. The plaintiffs appealed.

The court found the two plaintiffs who paid the penalty paid it voluntarily. Their claims could not proceed against the city because the plaintiffs did not exhaust their administrative remedies. Therefore, the government retained immunity from suit for their claims for reimbursement.

Additionally, they could not bring a takings claim because a litigant must use his administrative remedies rather than filing a claim in district court. The district court did not have subject-matter jurisdiction because the plaintiffs failed to exhaust their administrative remedies.

The third plaintiff who did not pay the penalty could not assert a takings claim, either, because he did not pay the penalty. He presented no evidence that the city would put a hold on his registration for failure to pay. He did not properly plead a takings claim.

The court affirmed the trial court's grant of the city's plea to the jurisdiction.

Red Light Cameras: *Watson v. City of Southlake*, No. 02-18-00143-CV, 2019 WL 4509047 (Tex. App.—Fort Worth Sept. 19, 2019). This is an interlocutory appeal of the granting of multiple pleas to the jurisdiction filed on behalf of multiple cities and the State of Texas for claims relating to red light cameras. The Second Court of Appeals found that Watson's prospective claims failed for lack of standing, his claims for reimbursement were barred by

immunity, and his takings claim failed because Watson failed to exhaust his administrative remedies.

Watson was a resident of Louisiana who was cited by the City of Southlake for violating its red-light-camera ordinance. He did not take advantage of his administrative remedies. He sued all cities in Texas who had red light cameras on behalf of all others who had been affected by the red-light-camera laws. He also sued the company that administered the city's red-light-camera program as well as other similar companies who administered other cities' red-light-camera programs. Finally, he sued the State of Texas. He alleged claims for (1) unconstitutional takings; (2) reimbursement of the civil fines; (3) an injunction prohibiting the government defendants from enforcing their red-light-camera laws; (4) declaratory judgment that the red-light-camera laws were unconstitutional; and (5) common law misrepresentation and deceptive trade practices violations.

The Second Court of Appeals found that Watson lacked standing to sue all of the defendants for prospective relief. Like in *Garcia v. City of Willis*, No. 17-0713, 2019 WL 1967140 (Tex. May 3, 2019), Watson's claims for prospective relief were too speculative for him to have standing. He had paid the fine, which put any imminent threat of injury in the past.

Watson likewise lacked standing to sue cities other than the City of Southlake and their private administrators for retrospective relief because he had not been harmed by the other cities. Additionally, although he sued on behalf of a class, he had not certified a class, and therefore, could not maintain claims based on a jurisdictional link. The court also determined that the trial court did not err in severing his claims against the other cities and administrators from his claims against the City of Southlake, the City of Southlake's red-light-camera-program administrator, and the State of Texas.

The court concluded the State of Texas and the city had immunity from suit for the reimbursement claims and Watson did not pay the fines under duress. Finally, as in *Garcia*, Watson had failed to exhaust his administrative remedies for his unconstitutional takings claim against the City of Southlake and the State of Texas because a hearing officer could have rendered his claims moot. Therefore, the trial court properly dismissed Watson's claims.

TAKINGS

Junked Vehicles: *Tucker v. City of Corpus Christi,* No 13-18-00328-CV, 2020 WL 948364 (Tex. App.—Corpus Christi Feb. 27, 2020). On August 5, 2013, a municipal court judge ordered the seizure of four vehicles located on property owned by Danis and Beverly Tucker. The Tuckers contended that the vehicles were antique cars that were not subject to seizure under the city's junked vehicle ordinance. Their initial suit against the city was dismissed on August 5, 2015, for want of prosecution. The Tuckers filed another lawsuit on August 4, 2017, alleging conversion, trespassing, invasion of privacy, due process violations, fraudulent misrepresentation of the city's code of ordinances, and the taking of personal property without just compensation. The city filed a plea to the jurisdiction contending that the Tuckers' claims were barred by the two-year statute of limitations in Civil Practice and Remedies Code Section 16.003. The trial court granted the city's plea to the jurisdiction and the Tuckers appealed.

In their sole issue on appeal, the Tuckers argued that the trial court erred in dismissing their takings claim because their suit was filed within the applicable limitations period. The court of appeals first, in reliance on the Supreme Court of Texas's decision in *Prairie View A&M v. Chatha*, 381 S.W.3d 500 (Tex. 2012), concluded that the statute of limitations is a jurisdictional requirement in suits brought against a governmental defendant. The Tuckers argued that their takings claim is governed by a ten-year statute of limitations, instead of two years. The court noted that the ten-year statute of limitations cited by the Tuckers applies to a governmental entity's taking of real property, not personal property like the automobiles at issue. Under Civil Practice and Remedies Code Section 16.003, the applicable statute of limitations was two years. Further, the court held that the Tuckers' initial lawsuit, which was dismissed for want of prosecution, did not toll the limitations period.

Because the Tuckers' lawsuit was filed on August 4, 2017, almost four years after the alleged taking and well beyond the two-year statute of limitations, the court concluded that the Tuckers failed to comply with a statutory prerequisite to suit, thus negating jurisdiction. The court of appeals affirmed the trial court's granting of the city's plea to the jurisdiction.

Takings: *City of Albany v. Blue*, No. 11-18-00051-CV, 2020 WL 1623719 (Tex. App.—Eastland Apr. 2, 2020) (mem. op.). This is an interlocutory appeal in a nuisance and inverse condemnation case where the Eastland Court of Appeals reversed the denial of the city's plea to the jurisdiction. It then remanded to allow the plaintiffs the ability to replead.

The City of Albany began construction of a drainage and improvement project for the city-owned golf course next to property owned by the plaintiffs. The plaintiffs assert the construction altered surface water flow and drainage resulting in the flooding of their property. They sued and the city filed a plea to the jurisdiction, which was denied. The city appealed.

The city only challenged the sufficiency of the plaintiffs' pleadings and did not submit any evidence contrary to the alleged facts. The city asserts that plaintiffs failed to allege facts that show an intentional act of the city. However, if the city knows that specific damage is substantially certain to result from its conduct, then takings liability may arise even when the government did not particularly desire the property to be damaged. The plaintiffs merely allege that the city "knew that its actions would cause identifiable harm, or that specific property damage was and is substantially certain to occur." However, conclusory statements in a pleading are insufficient to establish jurisdiction. As a result, the plaintiffs did not sufficiently plead an inverse condemnation claim. Likewise, they failed to allege the required intent needed to establish a nuisance claim against the city under the Texas Constitution. Again, they provide mere conclusory statements. However, the plaintiffs were not put on notice their pleadings were defective. The pleading defects in this case are not the type that can never be cured. As a result, the case is remanded to give the plaintiffs the opportunity to cure the defects.

Takings: *Schrock v. City of Baytown*, No. 01-17-00442-CV, 2019 WL 2621736 (Tex. App.—Houston [1st Dist.] June 27, 2019). In this inverse-condemnation case, the First Court of Appeals remanded the regulatory-takings claim back to the lower court for a new trial because there was enough evidence that a directed verdict was in error.

In 1993, Schrock purchased a house to use as a rental property. From 1993 until the beginning of 2010, the house was rented by a series of tenants and there were only ever a few weeks between tenants when the house was not occupied. During this time, the city required that tenants renting houses provide a copy of the lease agreement to the city and pay a larger deposit than home buyers before the city would provide utility services. In 2009, the city informed Schrock that he owed the city $1,999.67 for the unpaid utility bills of his prior tenants dating back to 1993. A city ordinance required that landlords submit a declaration that the property was a rental, or they would be responsible for unpaid utilities. Even though Schrock had failed to file the declaration, the city had notice at all times that the property was a rental. Schrock requested a hearing and that amount was reduced to $1,157.39 in unpaid bills that had accrued over the prior four years. The city sent notice to Schrock's attorney that he would need to pay within fourteen days, or the city would place a lien on the property pursuant to a city ordinance. The attorney never provided Schrock with the letter. The city's ordinance was in direct conflict with provisions of the Local Government Code that prohibited cities from charging property owners for unpaid tenant bills.

In 2010, a new tenant at the rental attempted to pay a deposit and have the utilities turned on but was told that Schrock had to pay the lien before utilities would be turned on. Schrock attempted to pay the lien but was told that in addition to the adjudicated amount, he would also have to pay for an unpaid bill that had happened after the adjudication, even though he had since submitted a declaration. Schrock ultimately did not pay the lien and brought a regulatory-taking and declaratory-judgment claim against the city. Schrock alleges that since 2010, the city has refused to provide water service to the property, which has led to damages. The house has been without a tenant since 2010. With no tenant to maintain the home, it fell into disrepair and became uninhabitable. Schrock sought damages for the loss of the property value and lost revenue from the inability to lease the property.

After a jury trial, the lower court rendered judgment in favor of the city on both the taking and declaratory-judgment claims. Schrock brought this appeal and argued that the lower court erred in granting a directed verdict because there were material fact issues to be determined by the jury.

To determine whether a regulatory-taking occurred, courts weigh the following three factors: (1) the economic impact of the regulation on the property owner; (2) the extent to which the regulation interferes with the property owner's distinct investment-backed expectations; and (3) the character of the government action. The First Court of Appeals held that, after looking at all the evidence, there was at least some of probative value for each of the factors. Therefore, the trial court erred in granting the city a directed verdict. However, the court did affirm the trial court's directed verdict on the declaratory-judgment claims because the court either did not have jurisdiction to decide them or they were rendered moot during the case.

TEXAS CITIZENS PARTICIPATION ACT

Texas Citizens Participation Act: ***City of Port Aransas v. Shodrok*****, No. 13-18-00011-CV, 2019 WL 6205466 (Tex. App.—Corpus Christi Nov. 21, 2019) (mem. op.)**. In July 2017, Julie Shodrok met with the mayor of Port Aransas in his office. Shodrok recorded their conversation

using the recording device on her cell phone, with the mayor's consent. When the meeting concluded, Shodrok left the mayor's office but forgot her phone. The mayor and the city manager had a private conversation that was recorded on Shodrok's phone, and Shodrok later expressed her frustration on social media about the details of the recorded private conversation between the mayor and the city manager.

The city filed suit against Shodrok for violating the Texas Interception of Communications Act (TICA). Shodrok moved to dismiss the suit based on the Texas Citizens Participation Act (TCPA) or anti-SLAPP statute. The trial court granted Shodrok's motion to dismiss and awarded her attorney's fees, costs, and sanctions against the city pursuant to the TCPA. The city appealed.

Pursuant to the TCPA, the appellate court first examined whether the city met its burden of establishing by clear and specific evidence a prima facie case for each essential element of the claim in question. The court held that it was undisputed that neither the mayor nor the city manager consented to Shodrok's recording of their conversation in the mayor's office. Therefore, the city established by clear and specific evidence a prima facie case that Shodrok intercepted a communication uttered by the city manager and mayor to which she was not a party by using a recording device. The burden then shifted to Shodrok to establish by preponderance of the evidence each essential element of a valid defense to the city's claim. Because Shodrok could not do so, the court sustained the city's first issue that it satisfied its burden to establish its TICA claim. Because the trial court erred in granting Shodrok's motion to dismiss, she was not entitled to attorney's fees and the sanctions award was not authorized.

The court reversed the trial court's judgment and rendered judgment that Shodrok take nothing on her request for attorney's fees and sanctions.

UTILITIES

Utilities: ***Texas Comm'n on Envtl. Quality v. Maverick Cty.*****, No. 03-17-00785-CV, 2019 WL 6042276 (Tex. App.—Austin Nov. 15, 2019) (mem. op.)**. This appeal stems from a district court's reversal of the Texas Commission on Environmental Quality's (TCEQ) final order granting an industrial wastewater discharge permit application for the Eagle Pass Mine (Mine) that is owned by Dos Repúblicas Coal Partnership (DRCP).

DRCP's predecessor in interest acquired a surface coal mining permit for the Mine in 2000, which was transferred to DRCP in 2009 when DRCP acquired the Mine. In 2009, DRCP entered into a contract mining agreement with Camino Real Fuels, LLC (CRF) to "develop, construct, operate and perform on-going reclamation at the Mine and to remove and deliver coal from the Mine" to DRCP. In 2013, the Texas Railroad Commission renewed and issued to DRCP a surface coal mining permit and approved CRF as the operator of the Mine. DRCP's predecessor in interest had also acquired a wastewater discharge permit (a TPDES permit) for the Mine in 1994, which it renewed in subsequent years, with the most recent permit expiring in 2015. After DCRF acquired the Mine, and prior to the expiration date of the most recent TPDES permit, DRCP applied to the TCEQ to amend and renew the permit.

The TCEQ executive director declared the application complete, and on DRCP's request referred the application to the State Office of Administrative Hearings (SOAH) to be heard by two administrative law judges (ALJs). The City of Eagle Pass, Maverick County, and other downstream landowners (Permit Contestants) were admitted as parties. Following a contested hearing, the ALJs issued a proposal for decision (PDF) recommending that the draft permit be granted with a few changes, including addition of a boron limit and a requirement that aluminum be monitored. After considering the PDF, TCEQ issued a final order granting DRCP's application, but excluded the ALJ's recommended findings relating to the boron limit and aluminum monitoring requirement, and instead imposed a sampling regime that would occur periodically over the life of the permit. The Permit Contestants appealed the decision to district court, alleging, among other things, that DRCP's contractor, CRF, should have applied as the permit operator, and that TCEQ improperly modified the PDF by deleting the boron limit and aluminum monitoring requirement.

The district court reversed TCEQ's final order and remanded because the agency's determination regarding the proper entity to be identified as the operator of the Mine was made in violation of statutory and regulatory provisions but upheld the other issues on appeal. DRCP and TCEQ appealed the district court's order reversing and remanding the operator issue. On cross appeal, the Permit Contestants challenge the district court's judgement affirming TCEQ's order as to the other issues raised.

In affirming the district court's order with respect to the operator issue, the court of appeals concluded that the TPDES permit application was incomplete because DCRP was not the operator of the Mine. The court looked to the plain language meaning of the regulatory definition for "operator," and determined that although DCRP has overall financial responsibility over the operations of the Mine, overall financial responsibility alone is not sufficient to support a conclusion that DRCP is the operator of the Mine. The court; however, vacated the portion of the district court's final judgement affirming the other issues on appeal concerning the specific TPDES permit granted by TCEQ because issuing a judgement on those issues would be issuing an impermissible advisory opinion.

Utilities: *City of Conroe v. San Jacinto River Auth.*, No. 18-0989, 2020 WL 1492411 (Tex. Mar. 27, 2020). This is a case brought under the Expedited Declaratory Judgment Act (EDJA) involving proper compliance with bond requirements by the local government. The EDJA provides an "issuer" of "public securities" an expedited declaratory procedure to establish the "legality and validity" of public securities and "public security authorizations." TEX. GOV'T CODE § 1205.021.

The Lone Star Groundwater Conservation District was created to address concerns about inhabitants of an area and their reliance on groundwater drawn from the Gulf Coast Aquifer. In 2008, the conservation district required all large-volume groundwater users—including the cities—to develop and implement plans for reducing their usage substantially. Mandatory groundwater usage cutbacks took effect in January 2016. Respondent San Jacinto River Authority (SJRA), a legislatively created conservation and reclamation district, developed a groundwater reduction plan (GRP) to draw surface water from Lake Conroe, treat the water, and

sell it to large-volume users. SJRA issued seven series of bonds between 2009 and 2016 that had an outstanding principal balance of approximately $520 million. SJRA entered into bilateral GRP contracts with about 80 water-system operators. The GRP rates are governed entirely by contract. Several cities sued the conservation district and the suit expanded to include SJRA. Several cities asserted they would not pay. SJRA filed suit under the EDJA seeking a declaration regarding the contracts and rates. The cities opted into the suit, but then filed pleas to the jurisdiction alleging SJRA did not seek a declaration as to "the legality and validity" of a "public security authorization," but instead sought to litigate what are substantively suits on contracts that properly lie outside the statute. The trial court denied the pleas and the cities appealed. The intermediary court of appeals held primarily for SJRA and the cities appealed to the Supreme Court of Texas.

The EDJA was enacted to "stop 'the age old practice allowing one disgruntled taxpayer to stop the entire bond issue simply by filing suit.'" The court went through an analysis of the EDJA and its purpose in considering jurisdiction and definitions. SJRA and the attorney general contend the GRP contracts, rate order, and rates themselves are public security authorizations because they are all connected to the bonds SJRA issued to finance the GRP project. The court first held the authority declaration concerns the legality and validity of SJRA's contracts with GRP participants, as GRP rate orders and rates are creatures of the contracts. As a result, the EDJA permits the trial court to exercise jurisdiction over this declaration. However, the court held the rate orders and rates lacked a proper connection with the bonds. Even though the rate order and rates may affect the amount SJRA is paid under the contracts, neither has an authorizing connection with the public securities. The EDJA treats execution of a contract to be connected but does not treat compliance with a contract as a public security authorization. As a result, SJRA can seek a declaration the contract was validly executed, but not whether it complied with the contract. As a result, the EDJA confers jurisdiction to declare whether the GRP contracts (as public security authorizations) are legal and valid, but it does not extend to declaring whether a specific rate amount set in a particular rate order is valid as it is controlled by the contract. SJRA may not obtain EDJA declarations concerning the cities' in personam rights and liabilities. The EDJA permits only in rem declarations concerning property rights.